# United States Court of Appeals for the Second Circuit



### APPELLANT'S APPENDIX

## 76-2132

To be argued by MICHAEL YOUNG

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES SMITH,

Petitioner-Appellant, :

-against-

UNITED STATES OF AMERICA,

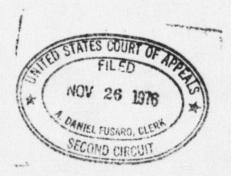
Respondent-Appellee.

Docket No. 76-2132

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APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



MICHAEL YOUNG, Of Counsel. WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
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DOCKET FILING DATE DIST/OFFICE NUMBER MO. DAY YEAR JUDGE YR. DOCKE. OTHER NUMBER DEM. NU 0716 **PLAINTIFFS** DEFENDANTS SMITH, Charles U.S.A. CHARLES SMITH UNITED STATES OF AMERICA

28 U.S.C. § 2255 VACATE SENTENCE CAUSE

75C-631 relates

For PLAINTIFF: Legal Aid Society Federal Defender Service Unit 509 U. S. Court House Foley Square, N.Y. 10007 (212) 732-2971 **ATTORNEYS** 

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0 000	ACO () SMITH VS. U.S.A.
DATE NR.	PROCEEDINGS;
11-10-75	By COSTANTINO, J Order dtd 11-10-75 allowing pltff toproceed in forma pauperis filed where the sum of the s
11-12-75	MEMORANDUM OF LAW FILED. (3)
11-18-75	Before JUDD, J. Case called. Adjourned to Dec. 1, 1975.
2-1-75	Before JUDD, J. CASE CALLED. Marked submitted pending submission of government's brief. DECISION RESERVED.
2/10/75	Govt's Response to Deft's Petition to Vacate his Pleasof Guilty filed. (4)
2/12/75	Govt's Response to Deft's Petition to Vacate His Plea of Guilt filed. (5)
2-19-75	Pltff's peply memorandum of law filed. www (6)
1.2-75	Before JUDD, J. Case called. Both sides present. Government's motion
	for adjournment DENIED. Motion to vacate conviction and sentence
1-8-76 1-8-76 3-12-76	argued. DECISION RESERVED.  Letter dtd 1-6-76 to J. Judd from Michael Young filed. (mg).  Affidavit of Charles Smith filed. (mg)  Py JUDD, JYemorandum to Counsel dtd 3-11-76 re evidentiary  hearing for 4-22-76 filed. Copies mailed from Chambers.  Petition for writ of habeas corpus ad testificandum. Writ issued. (10)
4-5-76	Writ returned & filed/unexecuted. (11)
4-22-76	Before JUDD, J Case called Both sides present Hearing begun on pltff's motion to set asi8de plea in related case 72-Cr-672 Hearing cont'd to 5-4-76
5-4-76	BY JUDD, J Order to show cause ret 5-4-76 at 1:45 PM why an order should not be entered quashing the subpoena served on Allen Sturim for the production of his entire file, etc and subpoena is temporary stayed pending disposition of motion filed. (12)
5-4-76	Before JUDD, J Case called for hearing Both sides present Hearing on petitioner; s appliacation to set aisde plea and senrence continued Hearing-concluded Decision reserved
8-6-76	Before MISHLER, J Case called for petition to withdraw guilty plea
9-13-76	Motion argued Decision reserved  By MISHLER, J Memo of detete decision and order denying petitioner motion to vacate his plea of guilty filed.  (13)
9-13-76	Judgment that the petitioner take nothing of the respondent and that the motion to vacate his plea of guilty is denied filed (14)
10-14-75 <b>√</b> 10-22-76	Notice of appeal filed by petitioner filed. (15) Civil appeal scheduling order filed. (16)
	DATED MODY. 1 30 76

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

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M'FL

CHARLES SMITH,

Petitioner,

-against-

Memorandum of Decision and Order

UNITED STATES OF AMERICA,

Respondent.

September 13, 1976

MISHLER, CH. J.

The petitioner moves to vacate the plea of guilty to Count One of the indictment 72 CR 672, on July 17, 1972, before Judge Orrin G. Judd, and the judgment and commitment made and entered January 23, 1973, sentencing the petitioner to a prison term of ten years.

#### THE INDICTMENT

The five-count indictment charged the petitioner with violations of 18 U.S.C. §§2114 and 641 (two counts of the indictment charged the petitioner with violations of 18 U.S.C. §§111 and 1114, which are not pertinent to this discussion). Count One of the indictment charged

the petitioner and his co-defendants with robbing John J.

Talton, Jr., of the sum of approximately \$5,000, which he had in his custody. Count Two of the indictment charged the petitioner with placing Mr. Talton's life in jeopardy during the commission of the crime charged in Count One. Count Five charged the petitioner and his co-defendants with stealing United States government funds in violation of 18 U.S.C.

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§641.

When Smith offered his plea on July 17, 1972,
Judge Judd made extensive inquiry to determine that the plea
was voluntarily and knowingly made. Judge Judd advised the
petitioner on the nature of the charge in Count One as robbing
"a person who had custody of United States funds in the amount
of about \$5,000," and further advised Smith that the offense
carried "a potential penalty of imprisonment for not more
than ten years." A discussion ensued concerning the possible
penalty under Count Two (the twenty-five year count), since
the government stated that it would dismiss that count "if
the government is satisfied" that Smith cooperated in giving
information concerning narcotic dealers and helping to locate
one of the co-defendants, A.C. Doyle. Referring to the tenyear count, Judge Judd said, "Mr. Smith, other than the risk

of going to jail for twenty-five years, other than that consideration, has anyone forced you to plead guilty?" Smith answered, "No Sir." Smith admitted his complicity in robbing Talton of the sum of approximately \$5,000. He stated that he and his three co-defendants had planned to rob Talton who they had believed to be a drug dealer about to make a purchase of narcotics. (It turned out that Talton was a special agent of the Drug Enforcement Agency, acting in an undercover capacity.) this court found that there was a factual basis for the plea and, satisfied that the plea was voluntarily, knowingly, and intelligently made, Judge Judd accepted the plea of guilty to Count One.

and became a fugitive. He was arrested and brought before the court for sentencing on January 23, 1973. Petitioner's counsel and the assistant United States attorney both discussed the disposition of "the twenty-five year count" (Count Two). Judge Judd stated, "According to the presentence report he stated that he was not guilty, that he pleaded guilty on the attorney's advice in order to avoid the 25-year sentence" (Tr. 1/23/73, p.5). The court then invited Smith to move to withdraw his plea of guilty to Count One. The

assistant United States attorney relented during the discussion and agreed "to dismiss the 25-year count" if the defendant was ready to be sentenced on Count One. The court indicated that it would not increase the prison term because of the bail jumping offense. Before sentencing the court again invited the petitioner to withdraw his plea, after stating the following:

The presentence report which I have made available to defendant's counsel and which they have just returned states the offense and states that he pleaded guilty on the advice of his attorney and if convicted he faced 25 years. Of course, as I read the statute, there was a mandatory 25 year sentence if he were convicted of participation in the armed robbery of a Federal agent, and there is going to be a substantial prison sentence and if the defendant wants to withdraw his plea and go to trial now, this is his last opportunity to make that request. I am not sure I would grant such an application because I have heard guilty pleas from the other three defendants in the case, and from all that I have learned I think that a jury would convict this defendant.

(Tr. 1/23/73, p.17).

Petitioner's application was triggered by the Second Circuit Court of Appeals' decision in <u>United</u>

States v. Rivera, 513 F.2d 519 (2d Cir. 1975), and <u>United</u>

States v. Reid, 517 F.2d 953 (2d Cir. 1975), which held that 18 U.S.C. §2114 is limited to cases having a postal

nexus. The dual-pronged attack leveled at the plea claims

(1) that an offense under §2113 is not alleged and/or is not supported by the facts established during the plea proceeding since the funds in Talton's custody were DEA funds; and (2) that the misinformation based on the mistake of law supplied by Smith's counsel, the prosecutor and the court that a conviction under Count Two would result in a mandatory 25-year term rendered the plea involuntary and void.

#### I. THE LACK OF A POSTAL NEXUS

The facts admitted by Smith constituted a violation of 18 U.S.C. §§641 and 2. This is not a case of a defendant pleading to a charge that does not constitute a /6 federal crime. A miscitation is not a ground for vacating an otherwise valid plea. United States v. Rivera, 513 F.2d 519, 533 n. 21 (2d Cir. 1975); United States v. Calabro, 467 F.2d 973, 981 (2d Cir. 1972), cert. denied, 410 U.S. 926, 93 S.Ct. 1358 (1973); United States v. McKnight, 253 F.2d 817, 820 (2d Cir. 1958). See F.Cr.P.R. 7(c).

### THREAT OF MANDATORY TWENTY-FIVE-YEAR TERM LATER FOUND TO BE ERRONEOUS

A guilty plea is more than an admission of unlawful conduct. It is a waiver of all the constitutional rights embodied in a right to a fair jury trial. It cannot be sustained unless the record shows it was "made voluntarily after proper advice and with full understanding of the consequences." Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 583 (1927); Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 513 (1962); Fontaine v. United States, 411 U.S. 213, 215, 93 S.Ct. 1461, 1462 (1973).

In <u>McCarthy v. United States</u>, 384 U.S. 459, 466, 89 S.Ct. 1166, 1171 (1959), the Court said:

Consequently, if a defendant's guilty plea is not equally voluntary and knowing it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

At the time Smith offered his plea, the statutory interpretation of §2114 comported with the advice of Smith's counsel, the prosecutor's statements and the pronouncement of the court with respect to the certainty of a 25-year mandatory term in the event of a conviction on Count Two. The record sustains Smith's claim that he pleaded to Count One to avoid the harshness of the penalty in the likely event of conviction on Count Two.

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The question presented by this application is whether a plea induced by fear of a mandatory 25 year prison term, which turned out to be baseless through subsequent decisional law, renders a plea involuntary and therefore void.

A plea is not rendered invalid because it is offered to avoid a heavier penalty, North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970); Farmer v. Caldwell, 476 F. 2d 22 (5th Cir.), cert. denied, 414 U.S. 868, 94 S.Ct. 178 (1973); Moore v. Swenson, 487 F.2d 1020 (8th Cir. 1973); Gaxiola v. United States, 481 F.2d 383 (9th Cir. 1973). A plea, however, based on the erroneous advice of counsel concerning maximum punishment cannot stand. Hammond v. United States, 528 F.2d 15 (4th Cir. 1975); Cooks v. United States, 461 F.2d 530 (5th Cir. 1972). The court in Cooks, supra at 532, noted:

Of course, counsel's inability to forsee future pronouncements which would dispossess the court of power to impose a particular sentence which is presently thought viable does not render counsel's representation ineffective nor does a plea later become invalid because it is predicated upon advice correct at the time, but later proved to be erroneous by reason of subsequent decisions. (citations omitted).

Smith cannot prevail on a retrospective assessment of his lawyer's advice, or the prosecutor's and court's statement of the law. The claimed coercive factor was the threat of severe punishment for conduct which, as the result of later decisions, could not have been the basis for a conviction on Count Two. The claim appears to be novel. An analysis of cases dealing with post-conviction changes in the law is helpful.

The <u>Brady</u> trilogy of cases provides a starting point. In <u>Brady v. United States</u>, 397 U.S. 742, 90 S.Ct.

1463 (1970), the petitioner was charged with kidnapping in violation of 18 U.S.C. §1201(a). A provision of this statute allowed the jury to recommend the maximum penalty of death if the kidnapping victim had been injured by the defendant.

Brady, whose victim had been harmed, pled guilty to the kidnapping charge rather than risk the death penalty in a jury trial. Subsequently, in <u>United States v. Jackson</u>, 390 U.S.

570, 88 S.Ct. 1209 (1968), the Supreme Court ruled that the death penalty section of 1201(a) imposed an impermissible burden on the exercise of the right to a jury trial. In a petition brought under 28 U.S.C. §2255, Brady argued that his plea of guilty had been coerced by the threat of the death

penalty. The Court denied the petition, holding that the plea was intelligent and voluntary:

[A]bsent misrepresentation or other impermissible conduct by state agents . . . a voluntary plea of guilty intelligently made in the light of then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.

390 U.S. at 757, 90 S.Ct. at 1473 (citations omitted). The Court found significant the fact that the plea was made with adequate advice of counsel as to the existing law and that there was no reason to question the accuracy of Brady's admissions. Id. at 757-58, 90 S.Ct. at 1473-74.

In McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970), three state prisoners filed petitions for writs of habeas corpus alleging that their guilty pleas had been induced by coerced confessions. The petitioners relied on the Supreme Court's decision in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), which ruled unconstitutional the New York procedure for determining the voluntariness of confessions. Since Jackson was later applied retroactively to defendants who had previously gone to trial, McMann v. Richardson, 397 U.S. at 773, 90 S.Ct. at 1450, the petitioners claimed that, had Jackson been available to them, the guilty

pleas would never have been entered since the confessions could have been challenged effectively at the trial. The Supreme Court rejected this argument, drawing a distinction between pleas of guilty and convictions obtained after a trial. The Court stated:

A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. It is that conviction and the confession on which it rests that the defendant later attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence. Whether or not the advice the defendant received in the pre-Jackson era would have been different had Jackson then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime.

397 U.S. at 773, 90 S.Ct. at 1450.

The Brady cases involved the invalidation of pretrial or sentencing procedures after the petitioners had entered guilty pleas. Where the post-conviction changes in the law had a substantive impact, altering the nature of the crime to which guilty pleas had been entered or requiring the government to establish additional elements of the crime,

the outcome of the collateral attack on the plea has depended in large measure on whether the government was entirely barred from prosecuting the defendant as a result of the new case law. In United States v. Liquori, 430 F.2d 842 (2d Cir. 1970), cert. denied, 402 U.S. 948, 91 S.Ct. 1614 (1971). petitioner pled guilty to unlawfully acquiring marijuana without paying the required transfer tax, in violation of 26 U.S.C. §4744(a). Subsequently, the Supreme Court decided Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 (1969), which held that a timely assertion of the privilege against self-incrimination is a complete defense to a §4744(a) prosecution. On a §2255 motion brought by petitioner, the Second Circuit vacated the conviction on the ground, inter alia, that the entire statutory scheme imposing punishment violated the Fifth Amendment. Significantly, Liquori did not argue that his plea of guilty was involuntary. United States v. Liquori, supra at 849. See United States v. Travers, 514 F.2d 1171 (2d Cir. 1974); Harrington v. United States, 444 F.2d 1190 (5th Cir. 1971).

A different result was reached in <u>Abbamonte</u>

v. <u>United States</u>, 335 F. Supp. 1180 (S.D.N.Y. 1972). There,

petitioner challenged his guilty plea to charges of violating

21 U.S.C. §174 (cocaine hydrochloride) on the ground that his plea was involuntary. Petitioner relied on the Supreme Court's decision in <u>Turner v. United States</u>, 396 U.S. 398, 90 S.Ct. 642 (1970), which struck down the presumption provision of §174 as applied to small amounts of cocaine. The district court denied the petition, ruling that the plea was a knowing and voluntary act:

We are not here dealing with a statute under which the government could not prosecute the defendant because of some constitutional barrier, as in United States v. Liquori. Rather, this is a case where, even if the inference authorized by the statute were impermissible, the government could prosecute the defendant, but would be required to establish the essential elements of the offense without reliance upon the inference. The fact that an intervening decision imposes a heavier burden upon the prosecution or makes its case weaker than the defendant originally thought does not vitiate a guilty plea.

335 F. Supp. at 1183.

See Hillaire v. United States, 438 F.2d 128 (5th Cir. 1971);

Riscard v. United States, 335 F. Supp. 671 (D. Puerto Rico
1972); Aleway v. United States, 329 F. Supp. 78 (C.D. Cal.
1971).

In the present case, we are not confronted with a situation where a defendant was induced to plead guilty by fraud or threats or other misconduct by government officials.

Nor does this case involve inadequate or misleading advice by counsel. Rather, petitioner's claim of coercion stems solely from the government's intention to prosecute petitioner for a crime that carried a mandatory 25-year sentence and from Judge Judd's advice that a conviction was likely. But the fact that §2114, which at the time was thought to provide a valid basis for prosecution, induced the plea does not necessarily establish that the plea was coerced. See Brady v. United States, 397 U.S. at 750, 90 S.Ct. at 1470. We see no reason why this case should not be governed by Brady v. United States, supra, where fear of an unconstitutional death penalty provision motivated the guilty plea. It is unimportant that in the present case petitioner's apprehension of a severe sentence turned out to be unfounded because the underlying offense could not have been prosecuted, while in Brady the sentence itself was struck down. In both cases, the pleas were motivated by the possibility of severe sentences, a factor that by itself does not render a guilty plea invalid. An otherwise valid plea is not involuntary "because induced by the defendant's desire to limit the possible maximum penalty . . . . " Parker v. North Carolina, 397 U.S. 790, 795, 90 S.Ct. 1458, 1461 (1970).

True, unlike <u>Brady</u>, in this case a mandatory sentence provision in the statute induced a plea to a charge of violating a different provision of the statute. Nonetheless, the distinction is without significance. Insofar as the issue of coercion is involved, it matters little whether the threat of a strict sentence is found alongside the substantive provision that is ultimately pled to or is contained in a separate section.

Furthermore, this is not a case in which the government is completely barred from prosecuting the defendant for the conduct acknowledged by the guilty plea. To the contrary, the facts underlying the plea constitute a violation of 18 U.S.C. §§641 and 642. A guilty plea not only involves entering the government's charges against the defendant without a trial. Central to the plea "is the defendant's admission in open court that he committed the acts charged in the indictment." Brady v. United States, 397 U.S. at 748, 90 S.Ct. at 1468. In this case, unlike those where a change in case law leaves no justifiable basis for prosecution, there is a strong governmental interest in punishment. See McMann v. Richardson, 397 U.S. at 774, 90 S.Ct. at 1450; United States v. Liquori, supra at 849;

Liptscher v. United States, 84 Civ. 4444 (S.D.N.Y. April 1, 1975). It would be pointless to overturn petitioner's guilty plea "when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved." Gosa v. Mayden, 413 U.S. 665, 685, 93 S.Ct. 2926, 2938-39 (1973). See United States v. Travers, supra at 1177-78.

Accordingly, the petitioner's motion to vacate his plea of guilty is denied, and it is SO ORDERED.

U. S. D. J.

#### FOOTNOTES

- Judge Judd, to whom this proceeding was assigned, died on July 7, 1976, and this proceeding was thereupon assigned to the undersigned.
- /2
  Count One charged as follows:

On or about the 30th day of May, 1972, within the Eastern District of New York, the defendants CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON and A.C. DOYLE did rob John H. Talton, Jr., a person having lawful charge, control and custody of money of the United States, of approximately five thousand dollars (\$5,000) of said money which was then in the charge, control and custody of the said John H. Talton, Jr. (Title 13, United States Code, §2114 and §2).

Count Two charged as follows:

On or about the 30th day of May, 1972, within the Eastern District of New York, the defendants CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON and A.C. DOYLE did rob John H. Talton, Jr., a person having lawful charge, control and custody of money of the United States, of approximately five thousand dollars (\$5,000) of said money which was then in the charge, control and custody of the said John H. Talton, Jr., and the defendants CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON and A.C. DOYLE, in effecting such robbery, did put the life of the said John H. Talton, Jr., in jeopardy by the use of dangerous weapons, to wit, two loaded hand guns (Title 18, United States Code, §§2114 and 2).

Count Five charged as follows:

On or about the 30th day of May, 1972, within the Eastern District of New York, the defendants, CHARLES, HERMAN ROBERTSON, RONALD JOHNSON and A.C. DOYLE wilfully and knowingly did steal approximately five thousand dollars (\$5,000) of money of the United States (Title 18, United States Code, §641 and §2).

- The petitioner is no longer incarcerated, having been paroled after the completion of one-third of his sentence; he has seven years of parole to complete. Parole status is, of course, "custody" within the meaning of 28 U.S.C. §2255, permitting motions to vacate a conviction, Wapnick v. United States, 406 F.2d 741, 742 (2d Cir. 1969).
- Judge Friendly, writing for the Court in both Rivera and Reid, relied on the Solicitor General's concession in United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971), vacated and remanded, 414 U.S. 807, 94 S.Ct. 169 (1973), that the legislative history showed that the statute was intended to be limited to postal service offenses. The Ninth Circuit adopted this reasoning in United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974). Judge Mansfield dissented in Reid, holding that the plain reading of the statute was to the contrary and that the court should not be bound by the interpretation of the Solicitor General.
- In Liptscher v. United States, (S.D.N.Y. April 1, 1975, Docket No. 74 C 4444) Judge Frankel, vacating a plea on a §2255 petition, held that a charge of conspiracy under 18 U.S.C. §2114 involving a larcenous scheme lacking a postal nexus did not constitute a federal crime.

In <u>Hammond</u>, the lawyer advised defendant that he could be sentenced to consecutive terms for a single bank robbery under 18 U.S.C. §2113(a) and (d), <u>i.e.</u>, 45 years. Defendant was charged in two bank robberies. In <u>Cooks</u>, the lawyer advised defendant he could be sentenced to six consecutive ten-year terms for a single act of transporting six forged securities in interstate commerce.

In Parker v. North Carolina, 397 U.S. 790, 90 S.Ct. 1458 (1970), the third case in the Brady trilogy, petitioner attacked his guilty plea to a burglary charge on the ground, inter alia, that the plea had been coerced by a North Carolina statute providing a maximum penalty in the event of a plea of guilty that was lower than the death penalty authorized after a verdict of guilty following a trial. The Court rejected this argument, relying on its decision in Brady.

\* \* \* \*

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

CHARLES SMITH,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR AN ORDER PURSUANT TO 28 U.S.C. \$2255

Civ. OGJ

MICHAEL YOUNG, attorney for petitioner Charles Smith, verifies the following:

I am an attorney associated with the Federal Defender Services Unit, The Legal Aid Society, assigned to represent petitioner Charles Smith in proceedings pursuant to 28 U.S.C. §2255.

I make this verification in support of petitioner Smith's application for an order pursuant to 28 U.S.C. §2255 directing that petitioner's guilty plea be set aside, that the judgment of conviction and sentence based thereon be vacated, that Indictment 72 Cr. 672 be dismissed as to petitioner, and that petitioner be released from the custody of the respondent. This relief is requested on the ground that, absent the requisite postal nexus, petitioner Smith's indictment for and plea of guilty to violation of 18 U.S.C. §2114 was invalid. (Rules 7(c) and 11, Federal Rules of Criminal Procedure; Fifth and Sixth Amendment of the Federal Constitution).

I make this verification on the basis of information obtained from the records and papers in this case. Petitioner Smith is presently incarcerated pursuant to a ten-year sentence of incarceration imposed by this Court on January 23, 1973, pursuant to his plea of guilty to Court 1 of Indictment 72 Cr. 672.

That indictment\* alleged that petitioner Smith and others participated in the assault of one John H. Talton, Jr., a Special Agent of the Bureau of Narcotics and Dangerous Drugs, \*\* and in the theft from Talton of \$5,000 belonging to the United States. These facts were alleged in Count 1 to constitute a violation of the first section of 18 U.S.C. \$2114, which proscribes simple robbery of a person in custody of mail matter or money belonging to the United States; in Count 2 to constitute a violation of the second section of \$2114, which proscribes aggravated robbery of such a person; in Count 3 to constitute a violation of the first section of 18 U.S.C. \$111 which proscribes assault on a federal officer, and 18 U.S.C. §1114 which proscribes the killing of a federal officer; in Count 4 to constitute a violation of the second section of \$111 which proscribes aggravated assault on a federal officer, and \$1114 which proscribes the killing of a federal officer; and in Count 5 to constitute a violation of 18 U.S.C. §641 which proscribes the theft of money from the United States.

On July 17, 1972, petitioner Smith pleaded guilty to Count 1 on the indictment, which alleged that the robbery of Talton constituted a violation of the first section of 18 U.S.C. §2114.\*\*\*

The district court, in accepting this plea, acknowledged the effect of Count 2 with its fixed twenty-five year sentence, on the defendant's decision to plead guilty to Count 1:

<sup>\*</sup> The indictment is set forth as Exhibit A to this petition.

\*\* Talton's status as a Special Agent of the Bureau of Narcotics and Dangerous Drugs is set forth in Counts 3 and 4 of the
indictment.

<sup>\*\*\*</sup> The transcript of the plea proceeding on July 17, 1972, is set forth as Exhibit B to this petition.

THE COURT: Mr. Smith, other than the risk of going to jail for twenty-five years if you are found guilty on trial, other than that consideration, has anyone forced you to plead guilty?

(PP at 17)\*

Likewise, the effect of the fixed twenty-five year penalty of Count 2 in deterring petitioner Smith from withdrawing his guilty plea to Count 1, despite his post-plea protestations of innocence, was apparent at the sentencing proceeding:

MR. DE PETRIS: Your Honor, before proceeding to sentence on both matters, I was wondering whether your Honor would want to clarify the fact bases for the plea for the original indictment, especially in view of the protestations of innocence to the Probation Officer.

THE COURT: The presentence report which I have made available to defendant's counsel and which they have just returned states the offense and states that he pleaded guilty on the advice of his attorney and if convicted he faced 25 years. Of course, as I read the statute, there was a mandatory 25 year sentence if he were convicted of participation in the armed robbery of a Federal agent, and there is going to be a substantial prison sentence and if the defendant wants to withdraw his plea and go to trial now, this is his last opportunity to make that request. I am not sure I would grant such an application because I have heard guilty pleas from the other three defendants in the case, and from all that I have learned I think that a jury would convict this defendant. (SP at 17)

Both Count 1, to which petitioner Smith pleaded guilty, and Count 2, which contained the fixed twenty-five year sentence, charged that the robbery of Talton, a Special Agent of the Bureau of Narcotics and Dangerous Drugs, violated 18 U.S.C. \$2114.

<sup>\*</sup> Numbers in parenthesis rafer to pages of the transcripts of the proceedings in this case. Numbers preceded by PP refer to the plea proceedings on July 17, 1972 (Exhibit B to this petition). Numbers preceded by SP refer to the sentencing proceeding on January 23, 1973 (Exhibit C to this petition).

That statute, however, is limited to offenses having a postal nexus. <u>United States v. Reid</u>, 517 F.2d 953, 956-8 (2d Cir. 1975); <u>United States v. Rivera</u>, 513 F.2d 519, 531-2 (2d Cir. 1975); <u>United States v. Fernandez</u>, 497 F.2d 730, 739-40 (9th Cir. 1974).

Neither count alleged that Talton was a postal employee or that the alleged offense possessed any form of postal nexus. At no time during the plea proceedings did the defendant admit or the Government offer to prove such nexus. Nor does the record establish that petitioner Smith was ever advised that \$2114 was limited to offenses relating to postal activities.

Since the facts alleged in Counts 1 and 2 did not constitute violations of \$2114, the citation of that statute in those counts was error. Petitioner Smith's plea of guilty to Count 1 was entered to avoid the danger of the fixed twenty-five year penalty of Count 2 which he was incorrectly advised was the necessary result of conviction on Count 2. He, thus, waived his trial rights based on misinformation as to the nature of the charges and their potential penalties. This misinformation misled petitioner Smith to his prejudice, rendering his guilty plea invalid. Rules 7(c) and 11, Federal Rules of Criminal Procedure; McCarthy v. United States, 394 U.S. 459 (1969); Brady v. United States, 368 U.S. 487 (1962).

WHEREFORE, it is respectfully prayed that this Court enter an order directing that Mr. Smith's guilty plea be set aside, that the judgment of conviction and sentence based thereon be vacated, that the indictment be dismissed as to Mr. Smith, and that Mr. Smith be released from the custody of the respondent.

MICHKEL ROUNG !-

New York, New York November 7, 1975 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHARLES SMITH,

Petitioner,

-v.
UNITED STATES OF AMERICA,

Respondent.

COMMONWEALTH OF PENNSYLVANIA 
SS.:

AFFIDAVIT

CHARLES SMITH, being duly sworn, deposes and says:

I am the petitioner in the above-captioned proceeding pursuant to 28 U.S.C. §2255. I make this affidavit in support of that application to have my plea of guilty to Count One of Indictment 72 Cr. 672 set aside, to have the judgment of conviction thereon vacated, and the indictment dismissed.

On July 17, 1972, I pleaded guilty to Count One of Indictment 72 Cr. 672, which charged that the robbery of one John Talton constituted a violation of the first section of 18 U.S.C. §2114 and §2. At the time I entered that plea, I had been led to believe that the alleged robbery of Talton constituted a violation of 18 U.S.C. §2114 and that, if I was convicted of the aggravated robbery of Talton charged in Count Two, I would be subjected to the mandatory twenty-five year sentence provided by the second section of 18 U.S.C. §2114. I had further been advised by the Assistant United States Attorney that Count Two of the indictment would be dismissed if I pleaded guilty to Count One and cooperated with the Government. I pleaded guilty to Count One on the basis of these understandings. I would not have so pleaded had I known that

the alleged robbery of Talton did not constitute a violation of 18 U.S.C. \$2114 and that I could not have been subjected to the mandatory twenty-five year sentence provided by \$2114 even if I was convicted of that robbery.

For these reasons and the reasons set forth in the petition, memorandum, and reply memorandum in this proceeding, my guilty plea was involuntary and made because I did not understand the nature of the crimes charged in the indictment. I therefore respectfully request that this Court set aside my guilty plea, vacate the judgment of conviction and sentence imposed thereon, and dismiss the indictment.

Charles SMETH

Sworn to before me this 2 day of Jan 1974

Notary Public

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CHARLES SMITH,

Petitioner,

-v.-

·UNITED STATES OF AMERICA,

Respondent.

Civ. OGJ

MEMORANDUM OF LAW FOR

PETITIONER SMITH

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHARLES SMITH,

Petitioner,

-v.
UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OF LAW FOR PETITIONER SMITH

#### STATEMENT OF FACTS

Petitioner Smith is presently incarcerated pursuant to a ten-year sentence of incarceration imposed by this Court on January 23, 1973, pursuant to his plea of guilty to Count 1 of Indictment 72°Cr. 672.

That indictment\* alleged that petitioner Smith and others participated in the assault of one John H. Talton, Jr., a Special Agent of the Bureau of Narcotics and Dangerous Drugs, \*\* and the theft from him of \$5,000 belonging to the United States. These

<sup>\*</sup> The indictment is set forth as Exhibit A to the petition.

\*\* Talton's status as a Special Agent of the bureau of Narcotics and Dangerous Drugs is set forth in Counts 3 and 4 of the
indictment.

facts were alleged in Count 1 to constitute a violation of the first section of 18 U.S.C. §2114, which proscribes simple robbery of a person in custody of mail matter or money belonging to the United States; in Count 2 to constitute a violation of the second section of §2114, which proscribes aggravated robbery of such a person; in Count 3 to constitute a violation of the first section of 18 U.S.C. §111 which proscribes assault on a federal officer, and 18 U.S.C. §1114 which proscribes the killing of a federal officer; in Count 4 to constitute a violation of the second section of §111 which proscribes aggravated assault on a federal officer, and §1114 which proscribes the killing of a federal officer; and in Count 5 to constitute a violation of 18 U.S.C. §641 which proscribes the theft of money from the United States.

On July 17, 1972, petitioner Smith pleaded guilty to Count 1 of the indictment, which alleged that the robbery of Talton constituted a violation of the first section of 18 U.S.C. §2114.\*

The district court, in accepting this plea, acknowledged the effect of Count 2 with its fixed twenty-five year sentence, on the defendant's decision to plead guilty to Count 1:

THE COURT: Mr. Smith, other than the risk of going to jail for twenty-five years if you are found guilty on trial, other than that consideration, has anyone forced you to plead guilty?

(PP at 17) \*\*

<sup>\*</sup> The transcript of the plea proceeding on July 17, 1972 is set forth as Exhibit B to the petition.

<sup>\*\*</sup> Numbers in parenthesis refer to pages of the transcripts of the proceedings in this case. Numbers preceded by PP refer to the plea proceedings on July 17, 1972 (Exhibit B to the petition). Numbers preceded by SP refer to the sentencing proceeding on January 23, 1973 (Exhibit C to the petition).

Likewise, the effect of the fixed twenty-five year penalty of Count 2 in deterring petitioner Smith from withdrawing his guilty plea to Count 1, despite his post-plea protestations of innocence, was apparent at the sentencing proceeding:

MR. DE PETRIS: Your Honor, before proceeding to sentence on both matters, I was wondering whether your Honor would want to clarify the fact bases for the plea for the original indictment, especially in view of the protestations of innocence to the Probation Officer.

THE COURT: The presentence report which I have made available to defendant's counsel and which they have just returned states the offense and states that he pleaded guilty on the advice of his attorney and if convicted he faced 25 years. Of course, as I read the statute, there was a mandatory 25 year sentence if he were convicted of participation in the armed robbery of a Federal agent, and there is going to be a substantial prison sentence and if the defendant wants to withdraw his plea and go to trial now, this is his last opportunity to make that request. I am not sure I would grant such an application because I have heard guilty pleas from the otehr three defendants in the case, and from all that I have learned I think that a jury would convict this defendant.

(SP at 17)

#### ARGUMENT

ABSENT THE REQUISITE POSTAL NEXUS, PETITIONER SMTIH'S INDICTMENT FOR, AND PLEA OF GUILTY TO, VIOLATION OF 18 U.S.C. \$2114 WAS INVALID.

#### A. The Error.

The indictment in this case alleged that petitioner Smith and others participated in the assault of one John H. Talton, Jr.,

a Special Agent of the Bureau of Narcotics and Dangerous Drugs, and the theft from him of \$5,000 belonging to the United States. These facts were alleged in Count 1 to constitute a violation of the first section of 18 U.S.C. §2114, which proscribes simple robbery of a person in custody of mail matter or money belonging to the United States; in Count 2 to constitute a violation of the second section of §2114, which proscribes aggravated robbery of such a person; in Count 3 to constitute a violation of the first section of 18 U.S.C. §111 which proscribes assault on a federal officer, and 18 U.S.C. §1114 which proscribes the killing of a federal officer; in Count 4 to constitute a violation of the second section of Slll which proscribes aggravated assault on a federal officer, and §1114 which proscribes the killing of a federal officer; and in Count 5 to constitute a violation of 18 U.S.C. §641 which proscribes the theft of money from the United States.

On July 17, 1972, petitioner Smith pleaded guilty to

Count 1 of the indictment, which alleged that the robbery of

Talton constituted a violation of the first section of 18 U.S.C.

\$2114. It is established law, however, that \$2114 is "limited

to offenses having a postal nexus." United States v. Reid,

517 F.2d 953, 956 (2d Cir. 1975); United States v. Rivera,

513 F.2d 519, 531-532 (2d Cir. 1975); United States v. Fernandez,

497 F.2d 730, 739-40 (9th Cir. 1974). The alleged offense in

the present case had no relationship whatsoever to postal acti
vity. Talton was not a postal employee, but rather a Special

Agent of the Bureau of Narcotics and Dangerous Crugs, engaged in

an undergover drug transaction at the time he was robbed.

Neither the indictment nor the record of the plea proceedings contain any suggestion that Talton or the money stolen from him had the requisite postal nexus to render this robbery violative of \$2114. Thus, even if the facts alleged in the indictment were proven, petitioner Smith could not have been guilty of a violation of either section of that statute. Consequently, the charge set forth in count 1 was improper, as were the guilty plea, judgment of conviction and sentence based thereon.

#### B. The Remedy.

Under Rule 7(c), Federal Rules of Criminal Procedure\* and this Circuit's decisions in <u>United States</u> v. <u>Reid</u>, <u>supra</u>, 517

F.2d at 958 and <u>United States</u> v. <u>Rivera</u>, <u>supra</u>, 513 F.2d at 533, such an error requires that the judgment of conviction be vacated and the defective count of the indictment be dismissed unless the acts alleged would constitute a different federal crime and the defendant was not misled to his prejudice by the improper citation of §2114.\*\* Assuming <u>arguendo</u> that the acts alleged in the indictment in this case would constitute a federal crime, albeit not a violation of §2114, the fact that petitioner Smith was misled by the indictment and the plea proceedings into believing that conviction for those acts would

\*\* In cases exhibiting no prejudice, the district court may merely vacate the original sentence, and resentence the defendant under the proper statute. United States v. Rivera, supra, 513 F.2d at 532.

<sup>\*</sup> Federal Rules of Criminal Procedure, Rule 7(c) requires that "... the indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated." It further provides that errors in such citations are grounds for dismissal of the indictment when they "mislead the defendant to his prejudice."

subject him to the severe penalties of §2114 was so prejudicial that his guilty plea must be set aside and the indictment dismissed.

Alternatively, the improper indictment and the misinformation conveyed to petitioner Smith in the present case require the setting aside of his guilty plea under McCarthy v. United States, 394 U.S. 459 (1969) and the other cases applying Rule 11, Federal Rules of Criminal Procedure, and Constitutional protections to guilty plea proceedings. Under Rule 11 and the case law pertaining to guilty pleas, a guilty plea is valid only if it is "equally voluntary and knowing." McCarthy v. United States, supra, 394 U.S. at 464-66 (1969). The defendant who pleads guilty must understand "the nature of the charges against him" (Id.) and, with requisite knowledge of those charges and their potential penalties, make a voluntary choice among the alternatives available to him. Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927).

In the present proceeding, petitioner Smith was prevented from making such a knowing and voluntary choice by an indictment which misled him as to the potential penalties to which he would be subjected upon conviction for the acts alleged therein. As previously explained, Counts 1 and 2 of the indictment charged that the alleged assault and robbery of narcotics agent Talton constituted violations of the first and second sections

of 18 U.S.C. §2114 respectively. This misled petitioner Smith into believing that if he went to trial and was convicted of the aggravated robbery of Talton charged in Count 2, he would be sentenced to the fixed twenty-five years of incarceration required by the second section of §2114.

This misinformation was reinforced when petitioner Smith was permitted to plead guilty to Count 1, which charged that simple robbery of Talton violated the first section of \$2114. The Court and the prosecutor, by concurring as to the propriety of petitioner Smith's plea of guilty to Count 1, clearly conveyed to petitioner their mistaken belief that the robbery of Talton was violative of \$2114. The inescapable implication of this for petitioner Smith was that if he could properly plead guilty to violating the first section of \$2114 for the simple robbery of Talton, then he would properly be subject to the fixed twenty-five year sentence of the second section of \$2114 if he chose instead to go to trial and was convicted of the aggravated robbery of Talton.

The coersive effect of this misinformation on petitioner Smith's choice among the alternatives available to him - whether to go to trial or plead guilty - is obvious. He was misled into believing that if he went to trial he would expose himself to the severe penalty of the second section of \$2114. On the other hand, if he pleaded guilty to Count 1 and cooperated with the Government, Count 2 of the indictment, with its fixed penalty, would be dismissed. (PP at 14).

Moreover, the Court, in accepting petitioner Smith's plea to Count 1, acknowledged the coersive effect of the fixed twenty-five year sentence of incarceration provided by the charge in Count 2:

THE COURT: Mr. Smith, other than the risk of going to jail for twenty-five years if you are found guilty on trial, other than that consideration, has anyone forced you to plead guilty?

(PP at 17)

Likewise, the effect of the fixed twenty-five year penalty of Count 2 in deterring petitioner Smith from withdrawing his guilty plea to Count 1, despite his post-plea protestations of innocence, was apparent at the sentencing proceeding:

MR. DE PETRIS: Your Honor, before proceeding to sentence on both matters, I was wondering whether your Honor would want to clarify the fact bases for the plea for the original indictment, especially in view of the protestations of innocence to the Probation Officer.

THE COURT: The presentence report which I have made available to defendant's counsel and which they have just returned states the offense and states that he pleaded quilty on the advice of his attorney and if convicted he faced 25 years. Of course, as I read the statute, there was a mandatory 25 year sentence if he were convicted of participation in the armed robbery of a Federal agent, and there is going to be a substantial prison sentence and if the defendant wants to withdraw his plea and go to trial now, this is his last opportunity to make that request. I am not sure I would grant such an application because I have heard guilty pleas from the other three defendants in the case, and from all that I have learned I think that a jury would convict this defendant.

(SP at 17)

Since petitioner Smith could not have been subjected to the fixed twenty-five year sentence even if convicted of the aggravated robbery of Talton alleged in Count 2, the coersive effect of that threatened penalty was highly improper and prejudicial\* and requires that the guilty plea be set aside.

This is not a case where the petitioner claims that his plea is involuntary merely "because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial." (Emphasis added) Parker v. North Carolina, 397 U.S. 790, 795 (1970) (interpreting the holding in Brady v. United States, supra). Here, prosecution under \$2114 with its fixed twenty-five year penalty was not "authorized." Rather, "the prosecutor threatened prosecution on a charge not justified by the evidence," rendering the resultant guilty plea invalid. Brady v. United States, supra, 397 U.S. at 751, fn. 8; cf. Machibroda v. United States, supra, 368 U.S. at 493; United States ex rel. McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963). At the time of the indictment and guilty plea proceedings in this case, there was no case law interpreting 18 U.S.C. §2114 so as to authorize prosecution for theft from a narcotics agent under that provision. To the contrary, apparently the only Court to have considered the

<sup>\*</sup> Similar prejudice was caused by the improper charges contained in Counts 3 and 4 of the indictment. These counts respectively alleged the assault and aggravated assault of Talton. However, in addition to charging that such an assault was a violation of 18 U.S.C. §111, the federal assault statute, both counts also charged that such an assault constituted a violation of 18 U.S.C. §1114, which proscribes the murder of a federal officer, and carries potential penalties of up to life imprisonment or death. Thus, these counts incorrectly informed the defendant that if he was convicted of the assault of Talton, he could somehow be subjected to the severe penalties provided for violations of §1114.

question of the scope of §2114 prior to the indictment in this case had conluded:

The derivation, condification, revision and explanation of what is now 18 U.S.C \$2114 thus all clearly indicate that the assault proscribed by that section is an assault which forms an integral part of an unsuccessful attempt to rob a mail carrier.

(United States v. Spear, 449 F.2d 946, 954 (D.C. Cir. 1971))

The Government in this case, by indicting petitioner Smith under \$2114 for the alleged robbery of a narcotics agent, chose to ignore the Spear holding, as well as the legislative history of \$2114, which limits that provision to offenses having a postal nexus. United States v. Reid, supra, 517 F.2d at 956-7 (discussion of the legislative history of \$2114). Although the motive of the Government in so proceeding is not expressly stated in the record, the transcript of the proceedings does reveal that the intimidating threat of the fixed twenty-five year sentence was effectively wielded by the prosecutor to encourage both petitioner Smith's guilty plea and his promise of cooperation with the Government. (PP at 14-15, 17; SP at 17).

In light of these factors, the record in this case fails to establish that petitioner Smith's guilty plea was made voluntarily, or that he possessed the requisite knowledge of the charges and potential penalties. Consequently, the plea must be set aside, (Rule 11, Federal Rules of Criminal Procedure; McCarthy v. United States, 394 U.S. 459, 464-66 (1969); Machibroda v. United States, supra, 368 U.S. at 493; United States v. Irizarry, 508

F.2d 960, 963-66 (2d Cir.1974)) and the indictment dismissed.\*

Rule 7(c), Federal Rules of Criminal Procedure; United States

v. Reid, supra; United States v. Rivera, supra; United States

v. Fernandez, supra.

## CONCLUSION

FOR THE ABOVE STATED REASONS AND THE REASONS SET FORTH IN THE PETITION, AN ORDER SHOULD BE ENTERED DIRECTING THAT PETITIONER'S GUILTY PLEA BE SET ASIDE, THAT THE JUDGMENT OF CONVICTION AND SENTENCE BASED THEREON BE VACATED, THAT INDICTMENT 72 CR. 672 BE DISMISSED AS TO PETITIONER, AND THAT PETITIONER BE RELEASED FROM THE CUSTODY OF THE RESPONDENT.

Respectfully submitted,

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<sup>\*</sup> Counts 2-5 of the indictment have already been dismissed at the request of the Government (SP at 28-29).

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

x

CHARLES SMITH,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

x

GOVERNMENT'S RESPONSE TO DEFENDANT'S PETITION TO VACATE HIS PLEA OF GUILTY

DAVID G. TRAGER United States Attorney Eastern District of New York 225 Cadman Plaza Fast Brooklyn, New York 11201

Richard Appleby
Assistant U.S. Attorney
(Of Counsel)

### PRELIMINARY STATEMENT

This is a motion pursuant to 28 United States Code,
Section 2255 requesting that petitioner Charles Smith's guilty
plea of July 17, 1972 be set aside, that the judgment of conviction and sentence based thereon be vacated, that Indictment
72 Cr 672 be dismissed as to petitioner, and that petitioner be
released from the custody of the respondent. The basis of the
petition is that <u>United States</u> v. <u>Reid</u>, 517 F.2d 953 (2d Cir. 1975),
compels the vacating of petitioner's plea of guilty. Relying on
a number of Supreme Court and Second Circuit cases, the Government
contends that Reid certainly does not permit such a result.

## THE GOVERNMENT'S EVIDENCE

On May 30, 1972 John Talton, Special Agent with the then Bureau of Narcotics and Dangerous Drugs was at a hotel room at the Anchor Motor Inn in Bayside, Queens, for the purpose of making an undercover purchase of a quarter of a kilogram of heroin. Shortly after 11:00 P.M. Talton heard a knock at the door by whom he thought were the would-be purchasers. When he opened the door, he was greeted by three black males, one of whom immediately pointed. a .38 caliber revolver at his head. These individuals were later identified as the defendants A.C. Doyle, Herman Robertson and Ronald Johnson. Doyle was the individual who pointed the gun at Talton. Robertson also bandished a pistol. After tying up Talton with belts and stockings, Robertson and Doyle then proceeded to rob Talton of \$5,031.00 of officially advanced Government funds that had been earmarked to purchase the heroin.

According to Robertson and Johnson, who cooperated with the Government and testified in the Grand Jury, petitioner Charles Smith (hereinafter "Smith") conceived and masterminded the robbery. Thus, Smith led the other three defendants to the Anchor Motor Inn ad waited outside in his car while the robbery took place; Smith directed his accomplices to the motel room where Talton was located, and Smith telephoned the motel room at a pre-arranged time in order to lure Talton out of his room so that the entry of his three accomplices would be facilitated. For his part in the robbery, Smith received half the proceeds.

All four defendants were indicted in a five count indict-

ment (72 CR 672). A copy of the indictment is attached as Exhibit A to petitioner's papers.

# THE PLEA OF GUILTY ON JULY 17, 1972

On July 17, 1972 Smith pled guilty after the Court made a careful inquiry to determine whether the plea was made voluntarily and with full knowledge of its consequences. The defendant stated that he understood the charges in the indictment (13); that he was satisfied with his attorney, Leslie Nizen, (13); that he understood that he had all the rights of a criminal defendant at trial (14); that no one had coerced him or induced him into pleading guilty (17-18); that he understood that the maximum penalty was ten years on Count One (18).

After all this was explained to him, Smith stated in his words what his part in the robbery was:

DEFENDANT SMITH: Outside the hotel I told them there was someone in the room with a large amount of money; that there was a drug dealer in room 116 and then I left and I imagine they proceeded inside to commit the robbery.

THE COURT: You told them he was there and that he had money and you expected that they would go in and rob him, didn't you?

DEFENDANT SMITH: Yes Sir:

THE COURT: All right. Is there anything else that should be known to me now?

MR. DePETRIS: Well, the only other thing I can think of is that part of the charge of robbery also includes an assault element. It doesn't have to be with putting life in jeopardy but it does include a certain amount

of force involved.

MR. NIZEN: Your Honor, Mr. Smith has not been charged with that.

THE COURT: He is being charged with helping in the robbery.

MR. DePETRIS: Perhaps some indication should be made that some force would be used.

THE COURT: Did you expect they would have trouble getting it from the party or parties involved?

DEFENDANT SMITH: I didn't know exactly what they was going to do, what means they would take to get it or if they would take it at all. I just supplied information.

THE COURT: Did you think they would make threats in order to get the money from him?

DEFENDANT SMITH: I imagine so, Your Honor.

THE COURT: All right.

Mr. Nizen, is there any reason why the plea should not be accepted?

MR. NIZEN: No. I recommend the acceptance of the plea.

THE COURT: I find the plea was made voluntarily with the knowledge of the defendant's rights and the knowledge of the consequences and that there is a basis in fact for the plea and I will accept it.1/

<sup>1/</sup> Just prior to Smith's plea on July 17, 1972, Robertson and Johnson pled guilty to Count Five. During the course of the plea, it was made clear to the Court that both defendants were cooperating, a fact which could not have escaped Mr. Nizen's attention (assuming it was not already clear tohim long before the plea) and which must surely have played a large part in Smith's decision to plead guilty.

At the plea Smith expressed a willingness in cooperating with the Government in order to apprehend Smith's suppliers of narcotics. Although Smith did plead guilty to Count One, the Government did not state, as it customarily does, that it would dismiss the remaining counts at sentence. The Assistant United States Attorney stated that these counts would be dismissed only if Smith cooperated fully with the Government between the time of his plea of guilty and sentence (15).

Counsel for Smith made no objection to the legal sufficency of Count One at the plea or at any stage of the proceedings. No pre-trial motions were filed on behalf of Smith attacking the legal sufficiency of any of the counts of the indictment. No attempt was made by counsel to preserve any point on appeal at the plea, although the Second Circuit clearly provides for such a method. United States v. Doyle, 348 F.2d 715, 719 (2d Cir. 1960).

# THE SENTENCING OF SMITH ON JANUARY 23, 1973

Smith became a fugitive after the plea. After being arrested, he was brought before the Court for sentencing on January 23, 1973. Smith was repsented by two attorneys, Leslie Nizen and Allen Sturim. At the outset the Assistant United States Attorney pointed out to the Court that he had not cooperated with the Government in any respect and that the Government reserved the right to prosecute Smith on Count Two, which carried the mandatory 25 year term of imprisonment. The Court then inquired of Mr. Sturim whether there was any application by the defendant to withdraw his plea to which counsel replied in the negative (18). The Court then stated:

"I think that the Government has made a concession by accepting a plea to a 10-year count. They told me they might still want to go to trial on the 25-year count if you did not cooperate, but I will not impose a sentence on this count and put you to trial on another. I will see that this ends the matter."

The Court then proceeded to sentence Smith to ten years on Count One, after which the Government decided to dismiss the remaining counts. At the sentencing Smith also pled guilty to an information charging him with bail jumping, for which he received a suspended sentence of two years.

# PROCEDURAL BACKGROUND TO THIS PETITION

On November 21, 1974 Smith filed a \$2255 petition alleging that his guilty plea was invalid because neither his counsel nor the Court advised him that it was necessary for him to have known that the victim of the robbery was a federal officer and that the money was the property of the United States in order to be guilty of violating \$2114. On December 10, 1974 the Court denied the \$2255 application, stating that such knowledge was not necessary. Subsequent to the latter decision the Supreme Court ruled squarely against Smith on this point in United States v. Feola, 95 S.Ct. 1255 (1975), effectively precluding any appeal from the Court's decision of December 10, 1976.

On April 24, 1975 the Second Circuit decided United States v. Reid, 517 F.2d 953 (2d Cir. 1975), which held that \$2114 applied only to crimes having a postal nexus. After Legal Aid was assigned to represent Smith in the appeal from the denial of his \$2255 petition, Smith moved in the Court of Appeals to withdraw his petition and the appeal taken therefrom and submit the present petition to this Court which asserts that Reid compells the setting aside of petitioner's conviction under Section 2114. The Government did not oppose the application. In the event the present petition is denied, appeals from both \$2255 petitions will be heard on a consolidated basis by the Court of Appeals.

## POINT I

UNITED STATES V. REID, SUPRA DOES NOT AUTHORIZE PLEAS OF GUILTY, ENTERED PRIOR TO THAT DECISION, TO BE VACATED BY MEANS OF \$2255 PETITIONS

United States v. Reid, 517 F.2d 953 (2d Cir. 1975) held that Title 18, United States Code, Section 2114, the statute to which Smith pled guilty, is "limited to offenses having a postal nexus." Smith contends that neither the indictment nor the record of the plea proceedings alleges any nexus to the mails. The Government submits that Reid does not lead to the vacating of pleas of guilty, through the vehicle of a \$2255 petition, much less those entered prior to that decision. Smith's plea should be measured by the traditional standard, that is, whether the plea was entered voluntarily and intelligently and with sufficient awareness of the relevant circumstances and likely consequences. See Boykin v. Alabama, 395 U.S. 238, 242 (1969); Brady v. United States, 397 U.S. 742 (1974). The plea minutes and the circumstances surrounding the plea on July 17, 1972 clearly reveal that this standard was met. Our analysis, however, begins with Reid itself.

Reid was an appeal after a jury trial. There the United States Attorney for the Southern District indicted Reid under \$2114 for assaulting a Drug Enforcement Agent despite the fact that, prior to the indictment, the Solicitor General,

in <u>United States v. Hanshan</u>, 442 F.2d 649 (7th Cir. 1971), vacated and remanded for reconsideration in light of Solicitor General's position, 414 U.S. 807 (1973), conceded that the statute is limited to offenses having a postal nexus. <u>Reid</u> did not state that the consequence of its holding was that all previously entered pleas of guilty were now vulnerable to \$2255 petitions. Judge Friendly, the author of that opinion, and a judge not insensitive to the possibility of an appeals court decision being used as a launching pad for \$2255 petitions, could easily have resolved that issue then and there if he had wished to do so.

The answer to the unresolved question in <u>Reid</u> may be found in Judge Friendly's opinion in <u>United States</u> v. <u>Travers</u>, 514 F.2d 1171 (2d Cir. 1974), not cited by Smith in his brief.

Travers was convicted in 1969 of mail fraud. The Court of Appeals affirmed in 1970 and rejected Travers' contention that certain mailings subsequent to his use of counterfeit Diners' Club credit cards were not related to the scheme sufficiently to come within the mail fraud statutes. Later in <u>United States v. Maze</u>, 414 U.S. 395 (1974) the Court was presented with the same issue as was presented in the <u>Travers'</u> appeal and took a contrary position. Travers thereafter petitioned the district court for a writ of error coram nobis, requesting that his conviction be vacated on the basis of <u>Maze</u>.

The Court held that Travers was entitled to vacate his sentence, notwithstanding the fact that his conviction had become

final. Noting that as a result of Maze Travers was convicted and punished "for an act that the law does not make criminal" (Travers, supra at 1176), the Court stated that "[i]t was simply Travers' bad luck that no conflict of decisions had yet developed when he unsuccessfully applied for certiorari from our decision..." Travers, supra at 1176.

The significance of Travers to the present case is that the Court made it clear that it permitted a collateral attack upon the conviction on the basis of the subsequent Maze decision only because Travers had fully pursued his appellate remedies after his conviction. This is made evident throughout the opinion but particularly in the Court's discussion of Sunal v. Large, 332 U.S. 174 (1947). Travers, supra at 1176-1177 ("Where Sunal may assist the Government is in limiting collateral attack on the basis of Maze to defendants who, like Travers, fully pursued their appellate remedies.") Under Travers, therefore, a defendant who goes to trial, offers a defense which is not permitted by the trial court to be offered to the jury as a matter of law, and then fails to pursue that issue on appeal, is precluded from raising that same issue in a §2255 petition, notwithstanding favorable decisional law that may later emerge on that issue subsequent to his conviction. We fail to see how Smith, who pled guilty and waived his right of appeal, and who had every opportunity to raise the issue presented in this petition in a Rule 12(b) motion after receiving the indictment or by preserving the point on appeal under United States v. Doyle, 348 F.2d 715, 719 (2d Cir. 1965) is in any better position.

In <u>Sunal v. Large</u>, <u>supra</u>, the Court held that collateral attacks would not lie against selective service convictions rendered in 1945, which were erroneous under the rule announced early in 1946 in <u>Estep v. United States</u> and <u>Smith v. United States</u>, 327 U.S. 114. (1946). We agree with Judge Friendly's analysis in <u>Travers of Sunal v. Large</u>, <u>supra</u>, that

"... we must take Sunal as meaning that when the error is one which can be rectified by proper construction of a criminal statute without resort to the Constitution, a claim that a conviction was had without proof of all the elements required by the statute is not a constitutional claim as that phrase is used in respect of collateral attack, and that, in consequence, collateral relief will rarely be accorded to those who, even for apparently good reasons, did not exhaust the possibilities of direct review."

Travers, supra at 1177. We submit that Sunal v. Large, supra and the interpretation placed upon it by the Court of Appeals disposes of this petition. See also <u>Davis</u> v. <u>United States</u>, 417 U.S. 333, 345-346 (1974) and Judge Friendly's discussion of <u>Davis</u> in <u>Travers</u> at p. 1175-1177; <u>Rodman v. Pothier</u>, 264 U.S. 399 (1924) (Validity of statute may not be raised in habeas corpus petition where the issue could have been raised at the trial level); <u>Toy Toy v. Hopkins</u>, 2/212 U.S. 542 (1909). (Alleged facts, even if they showed lack of

<sup>2/</sup> In United States v. Macklin, slip. op. 5911, 2d Cir., decided September 4, 1975, the Court of Appeals held that dismissal of the indictment against the defendant was required under United States v. Fein, 504 F.2d 1170 (2d Cir. 1974) because the grand jury which returned the indictment was improperly extended, notwithstanding defendant's plea of guilty entered prior to Fein. However, the Court stated (at p. 5916): "There is no doubt that where the matter is raised in a habeas corpus or in a \$2255 proceeding long after a conviction, a challenge to the grand jury as unconstitutionally constituted on racial grounds will not avail, because of failure to assert the claim under Fed. R. Crim. F. 12(b)(2), citing Tollett v. Henderson, 411 U.S. 258 (1973) and Davis v. United States, 411 U.S. 233 (1973).

jurisdiction of trial court, are not properly raised in a habeas corpus proceeding if they could have been raised on direct appeal).

We submit that <u>Brady</u> v. <u>United States</u>, 397 U.S. 742

(1970) is further strong support for our position. Brady was convicted in 1959 upon his plea of guilty to kidnapping, 18 U.S.C. \$1201(a). After his plea the Court held in <u>United States</u> v. <u>Jackson</u>, 390 U.S. 570 (1968), that the death penalty provision of \$1201(a) was unconstitutional because it permitted imposition of the death sentence only upon a jury's recommendation and thereby made the risk of death the price of a jury trial. Petitioner filed a \$2255 petition in 1967 claiming that his plea of guilty was not voluntary because \$1201(a) operated to coerce his plea.

Thus, the same issue was presented to the Court as is presented in this petition: the effect of a subsequent court decision upon a previously entered plea of guilty, which decision apparently undermines the basis for the plea. The Court held that the

<sup>3/</sup> The correctness of these decisions is revealed by assuming, for example, that the Government's evidence at trial would show that the funds in the custody of Agent Talton did have a postal nexus. Reid does not stand for the proposition that the indictment must allege a postal nexus but, rather, that the proof at trial must show such a nexus. Should every defendant who pled guilty under this statute now be able to launch a successful §2255 attack requiring the Government at a hearing to prove the requisite postal nexus? The Government has no statistics at this time of the number of defendants who have pled guilty under this statute where there was no allegation in the indictment of a postal nexus. We note, however, that 95% of all criminal convictions are obtained as a result of pleas of guilty. Brady v. United States, supra at 752 n.10. It is submitted that to permit Smith to vacate his conviction would be an undermining of the integrity of convictions based upon pleas of guilty and an unwarranted extension of Reid.

petition should not lie, refusing to automatically permit the vacating of the plea on the basis of the Jackson decision.

In language applicable here, the Court stated in Brady (at page 757):

"A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents cf. Von Multke v. Gillies, 332 U.S. 708 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."

In McMann v. Richardson, 397 U.S. 759 (1970), the companion case to Brady v. United States, supra, the Court was again faced with whether a plea of guilty should be disturbed in a collateral attack in the light of subsequent decisional law.

Respondents were convicted in state court of felonies, following their pleas of guilty, and entered on advice of counsel. Respondent Dash asserted that his attorney had advised him to plead guilty because he did not "stand a chance due to the alleged confession signed" by him, McMann v. Richardson, supra at 762. Respondent Richardson asserted that he advised his attorney that he did want to plead guilty to something he did not do, and that his attorney advised him to plead guilty to avoid the electric chair, saying that "this was not the proper time to bring up the confession" and that Richardson" could later explain by a writ of habeas corpus how my confession had been beaten out of me."

McMann v. Richardson, supra at 762-763.

Subsequent to their pleas of guilty, the Court decided

Jackson v. Denno, 378 U.S. 368 (1964), holding that the New York

procedure for determining the voluntariness of confessions (which

would have been applicable to responents had they gone to trial) to

be unconstitutional. That procedure required that the trial judge,

when the confession was offered and a prima facie case of voluntarines

established, to submit the issue to the jury without himself re
solving disputed issues of fact and determining whether or not the

confession was voluntary.

The Jackson decision was later held to apply retroactively to defendants who had previously gone to trial. McMann v. Richardson, supra at 773. In view of these holdings, the Second Circuit held that respondents were entitled to a hearing on the voluntariness of their confessions, reasoning that "if in a collateral proceeding a guilty plea is shown to have been triggered by a coerced confession - if there would have been no plea had there been no confession - the plea is vulnerable at least in cases coming from New York where the guilty plea was taken prior to Jackson v. Denno, supra." McMann v. Richardson, supra at 766.

The Supreme Court rejected that reasoning and held that pleas of guilty stand on a completely different footing than convictions obtained after trial. The Court stated in language applicable here:

"We are unimpressed with the argument that because the decision in Jackson has been applied retroactively to defendants who had previously gone to trial, the defendant whose confession allegedly caused him to plead guilty prior to Jackson is also entitled to a hearing on the voluntariness of his confession and to a trial if his admissions are held to have been coerced. A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. It is that conviction and the confession on which it rests that the defendant latter attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence. Whether or not the advice the defendant received in the pre-Jackson era would have been different had Jackson then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime.

What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. It might be suggested that if Jackson had been the law when the pleas in the cases below were made -- if the judge had been required to rule on the voluntariness of challenged confessions at a trial -- there would have been a better chance of keeping the confessions from the jury and there would have been no guilty pleas. But because of inherent uncertainty in guilty-plea advice, this is a highly speculative matter in any

particular case and not an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea. The alternative would be a per se constitutional rule invalidating all New York quilty pleas that were motivated by confessions and that were entered priot to Jackson. This would be an improvident invasion of the State's interest in maintaining the finality of guilty-plea convictions that were valid under constitutional standards applicable at the time. It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further , he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act. "4/ (Emphasis supplied) (McMann v. Richardson, supra, pp.773-774)

4/ Menna v. New York, 18 Crim. L. Rptr. 4074, United States Supreme Court (Per Curiam), decided November 17, 1975, does not undermine the authority of Brady v. United States, supra and McMann v. Richardson, supra, in the context of this case. There the indictment to which the defendant pled guilty was void ab initio because it violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Here, the indictment was valid on its face at the time the plea was entered. Furthermore, unlike the case at hand, Menna immediately took an appeal from the plea of guilty.

#### POINT II

SMITH'S PLEA OF GUILTY DID NOT RESULT IN A "COMPLETE MISCARRIAGE OF JUSTICE" AND PRESENT "EXCEPT-IONAL CIRCUMSTANCES THAT JUSTIFY COLLATERAL RELIEF UNER §2255"

Since Reid does not automatically lead to the granting of this petition, it must be determined whether the petition belongs in that rare category of cases, referred to by Judge Friendly in Travers (See p. 12, ante) which merit collateral relief, notwithstanding a failure to pursue appellate remedies or whether the plea of guilty resulted in a "complete miscarriage of justice" and presented "exceptional circumstances that justify collateral relief under §2255." Hill v. United States, 368 U.S. 424, 428 (1962). The plea minutes, the sentencing minutes, and an analysis of all the circumstances surrounding the plea, will reveal that Smith's plea was entered into voluntarily, intelligently and with sufficient awareness of the relevant circumstances and likely consequences. Boykin v. Alabama, 395 U.S. 238 (1969).

# A. Prejudice to the Government.

This petition comes three years after the plac of guilty. Since the Government's key witnesses have been sentenced and are no longer in custody, as a practical matter it would be extremely difficult, if not impossible, to bring this prosecution on any of the counts of the indictment. Further, Smith had every opportunity to preserve this issue, not-withstanding his plea of guilty. See United States v. Ury, 106

F.2d 28 (2d Cir. 1939). In 1972 no case had squarely decided the issue of whether \$2114 applies only to postal employees, although what law that did exist appeared to favor a broad interpretation. See United States v. O'Neil, 436 F.2d 571 (9th Cir. 1970); United States v. Sherman, 421 F.2d 198 (4th Cir. 1970, cert denied sub nom., Sherman v. United States, 398 U.S. 914 (1970). This case is also distinguisible from Reid in that there, unlike the present case, the United States Attorney's Office was on notice as to the nonapplicability of §2114 to Drug Enforcement Administration agents as a result of the Solicitor General's position in United States v. Hanahan, supra. In any event, research would have revealed that a possibly successful attack on Counts One and Two could be mounted. Nevertheless, the defense stategy was not to raise the issue and hope for leniency from the Court. After having failed to raise that issue, the Government should not now be prejudiced in having to try a case when the witnesses are most likely unavailable to testify. Obviously, if the issue had been raised pre-trial and decided against us by the district court, we would have insisted that the defendant plead guilty to Counts Three, Four or Five. If Smith had preserved the point on appeal after a plea of guilty, and if he had been successful in the Court of Appeals at that time, the Government would have proceeded to trial on the valid counts. Now we are precluded from that possibility. Finally, no allegation is made that Smith was denied the effective assistance of counsel. That counsel may have misjudged the vulneribility of \$2114 is no ground

for now upsetting the plea. McMann v. Richardson, supra at 770 B. Prejudice to Smith.

Smith was in no respect prejudiced by what occurred. His admission of guilt on July 17, 1972 was, in fact, also an admission of guilt as to Counts Three, Four and Five. The essence of Count Five is stealing which is one of the elements of the crime of robbery contained in Count One. The essence of Count Three is assault and of Count Four, assault with use of a dangerous weapon, all of which elements are embodied in Count One. The maximum penalty for Counts Four and Five is also ten years plus a fine. Count One had read exactly as it does now and contained a citation to §641 rather than to §2114 it is difficult to see how Smith could then complain. "It is settled law that citation of a wrong section of the penal code, not going to the substance of the crime charged is not grounds for dismissal of an indictment, at least where the defendant had not been misled to his prejudice." See United States v. Rivera, 513 F.2d 519, 533 n. 21 (2d Cir. 1975); See Fed R. Crim. P. 7(c).

Confronted with the logic of this, Smith is forced to take the position (Petitioner's Brief, p. 5-7) that the <u>only</u> reason he pled guilty was to avoid the 25 year exposure on Count Two.

The trouble with this is that, first, it was entirely fortuitous that Smith pled guilty to Count One rather than Count Five which carries the same prison sentence. It was just the Government's bad luck that \$2114 was later held to be inapplicable by the Court of Appeals rather than \$641. Second, the prosecutor stated that

Count Two would not be dismissed at sentencing unless the defendant cooperated meaningfully with the Government. Even at the sentencing, when Judge Judd again gave Smith the opportunity to withdraw his plea, the prosecutor indicated that Count Two would remain open because Smith had not cooperated. It was only because of the heavy sentence imposed that Count Two was then dismissed. Moreover, as stated above, Smith's co-defendants, Robertson and Johnson pled guilty the same day wherein it was made obvious that they were cooperating with the Government. This fact must have led, in no small measure, to Smith's decision to plead guilty.

# C. Smith's Plea of Guilty was Voluntary.

The plea minutes of July 17, 1972 make it clear that

Smith's plea was entered into voluntarily with full knowledge of
its possible consequences (See p. 3-6 ante). It is simply not true,
as alleged by Smith (Petitioner's Brief, p. 10), that the Assistant
United States Attorney threatened Smith. We stand on the transcript
to support our position. Smith's contention that he was "misled"
(Petitioner's Brief, p. 6) by the prosecutor and judge is also not
true. The law as it then existed did not foreclose prosecuting
Smith under \$2114. The implication by Smith (Petitioner's Brief,

p. 10) that the Government at the time knew that the statute did not apply to the facts of the case is uncalled for. While we do not believe a hearing is necessary on this point, if the Court wishes an affidavit or testimony we are prepared to provide it.

<sup>5/</sup> Smith implies (Petitioner's Brief, p.10) that United States v.

Spear, 449 F.2d 946, 954 (D.C. Cir. 1971) somehow put the Government or notice that it was proceeding under the wrong statute. While Spear indicates §2114 applies to postal officers it certainly does not rule out its application to other federal agents.

# CONCLUSION

- (1) The cases of <u>United States v. Travers</u>, <u>supra</u>, <u>Sunal v. Large</u>, <u>supra</u>, <u>Brady v. United States</u>, <u>supra</u> and <u>McMann v. Richardson</u>, <u>supra</u>, preclude Smith from vacating his plea of guilty.
- (2) Smith's plea was voluntary. He has shown no prejudice. The Government will be prejudiced by now proceeding to trial. Accordingly, the petition should be denied.

Respectfully submitted,

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to faise them in direct appear. A defendant is precluded

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

CHARLES SMITH,

Petitioner,

-v.-

75 Civ. 1880

UNITED STATES OF AMERICA, Respondent.

REPLY MEMORANDUM OF LAW

FOR PETITIONER SMITH

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHARLES SMITH,
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-v.
UNITED STATES OF AMERICA,
Respondent.

REPLY MEMORANDUM OF LAW
FOR PETITIONER SMITH

# STATEMENT OF FACTS

The Government, in its memorandum in opposition to petitioner Smith's §2255 application, raises two arguments. The first is that procedurally, petitioner Smith is precluded from challenging the validity of his guilty plea through a §2255 application because he pleaded guilty and did not take a direct appeal. The second argument is that even if §2255 proceedings are available to petitioner Smith, his petition must be denied on the merits.

Before analyzing these arguments, it is important to note that the principal factual claims in Smith's petition are not contested by the Government. Nowhere in the Government's brief does it attempt to argue that the robbery of Talton constituted a violation of 18 U.S.C. §2114. Indeed, it is precluded from so arguing by the fact that Talton's robbery lacked the postal nexus requisite to a violation of §2114. Yet the Government argues that petitioner may be required to continue serving a sentence imposed under that statute, for acts which do not constitute a violation of that statute.

Moreover, the Government does not dispute petitioner Smith's claim that he believed that he would be subject to the mandatory 25 years sentence provided by §2114 if he elected to go to trial and was convicted of robbing Talton. Yet the Government claims that this misinformation did not have a coersive effect on petitioner's plea, and did not violate the requirement that a defendant who pleads guilty must do so voluntarily with understanding of the nature of the crimes charged. McCarthy v. United States, 394 U.S. 459, 464-7 (1969); Rule 11, Federal Rules of Criminal Procedure.

A. Petitioner Smith is entitled to seek relief under 28
U.S.C. §2255, despite the fact that he pleaded guilty and
did not seek a direct appeal.

Petitioner Smith pleaded guilty to violation of 18 U.S.C. §2114. The basis of his present §2255 application is that his plea was invalid because he did not plead voluntarily or with understanding of the offenses charged, and because there is no factual basis for the plea.

The Government asserts that §2255 is not available. Looking to the line of cases commonly identified as the Brady trilogy,\* the Government argues that petitioner Smith somehow waived his right to challange the factual basis for, and the voluntariness of his guilty plea in a §2255 application, by pleading guilty (Government's Memo. at 13-17). Alternatively, the Government, citing United States v. Travers, 514 F.2d 1171 (2d Cir. 1974), and Sunal v. Large, 332 U.S. 174 (1947), argues that Smith waived his right to raise these issues in a §2255 application by failing to take a direct appeal from his judgment of conviction (Government's Memo. at 10-13).

The Government's waiver arguments are the identical ones recently made by the Government and rejected by Judge Frankel in <u>Liptscher v. United States</u>, 74 Civ. 4444 (S.D.N.Y. April 1, 1975). (A copy of this opinion is attached hereto

<sup>\*</sup> See e.g., The Guilty Plea as a waiver of "Present but Unknowable" Constitutional Rights: The Aftermath of the Brady Trilogy, 74 Col. L. Rev. 1435, hereinafter cited as "The Aftermath of Brady." These cases include Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

as Exhibit A). Liptscher's §2255 application was based on his claim that his plea of guilty was invalid because under United States v. Maze, 414 U.S. 395 (1974), and United States v. Travers, 514 F.2d 1171 (2d Cir. 1974), the credit card fraud which he had perpetrated lacked the requisite mailings to constitute a violation of the mail fraud statute to which he had pleaded guilty. He argued that he was therefore being punished pursuant to a statute which he had not violated. Judge Frankel, after examining the same Brady trilogy and Travers - Sunal arguments of waiver as are raised by the Government here, concluded that neither Liptscher's guilty plea nor his failure to take a direct appeal precluded him from raising his claim in an application pursuant to 28 U.S.C. §2255.

Both of the Government's waiver arguments were also rejected by the Second Circuit Court of Appeals in <u>United</u>

States v. <u>Liguori</u>, 430 F.2d 842 (2d Cir. 1970) and <u>United</u>

States v. <u>Liguori</u>, 438 F.2d 663 (2d Cir. 1971). In the first <u>Liguori</u> case, the defendant pleaded guilty to violation of 26 U.S.C. §4744(a) for obtaining marijuana without having paid the transfer tax (<u>Id</u>., 430 F.2d at 843). When the Supreme Court shortly thereafter decided <u>Leary</u> v. <u>United</u>

States, 395 U.S. 6 (1969), thereby providing Liguori with a defense to the charge of violating 26 U.S.C. §4744(a), he filed a §2255 application seeking to have the judgment of

conviction and sentence imposed pursuant to his guilty plea set aside. As in the present proceeding, the Government argued that Liguori had waived his right to raise this issue. The Court of Appeals held that petitioner had not waived his right to raise such an issue in a \$2255 application by failing to raise it at trial or on direct appeal (Id., 430 F.2d at 847). Then, after a careful examination of the Brady trilogy, the Court held that petitioner had not waived his right to raise this issue collaterally by pleading guilty. In so holding, the Court distinguished the Brady trilogy on the pound that Leary provided Liguori with a complete defense to the charge that he had violated \$4744(a) (Id., 430 F.2d at 848-9).

In the present case, the Second Circuit's holding that §2114 required a postal nexus likewise provides petitioner Smith with a complete defense to the charge that he had violated that statute. Consequently, as in <u>Liquori</u> and <u>Liptscher</u>, he did not waive his right to raise that issue collaterally by pleading guilty or failing to take a direct appeal.

Liquori and Liptscher are dispositive of the Government's waiver arguments.

# 1. The Plea is not a waiver

In addition, for the reason that <u>Rivera</u> establishes both that there is no factual basis for the plea to §2114 and that the plea was not made voluntarily with the requisite

understanding of the offense charged, the plea is not a waiver of the right to bring a \$2255 proceeding. It is established law that a defendant by pleading guilty, does not waive the right to challenge by \$2255 application the factual basis or voluntariness of his guilty plea.

McCarthy v. United States, 394 U.S. 459 (1969); Irizarry v. United States, 508 F.2d 960 (2d Cir. 1975); Seiller v. United States, slip op. 6509 (2d Cir. December 1, 1975).

The simple response to the Government's reliance on the Brady trilogy is that such a broad interpretation of the Brady trilogy has been expressly repudiated by both the Supreme Court and this Circuit. The Brady trilogy involved collateral attacks on guilty pleas on the basis of subsequent Supreme Court decisions establishing new, but retroactive, procedural rights for criminal defendants; such as a defendant's right to challenge the admissibility of a confession out of hearing of the jury (McMann) and a defendant's right to a trail "free from impermissible burdens" (Brady and Parker) (See "The Aftermath of Brady," supra, at 1445). The Supreme Court, in the Brady trilogy, held that defendants, by pleading guilty, had waived these procedural rights despite the fact that they could not have known about them at the time of their pleas. However, the Supreme Court and the Circuit Courts have subsequently limited application of the Brady trilogy definition of waiver to "unknowable" procedural rights which, had they been applied

to the pleading defendant's case, "would have weakened the State's case, but would not have precluded it." "The Aftermath of Brady," supra, at 1447; United States v.

Liquori, supra, 430 F.2d at 848-49, 851-52. It is significant, in this regard, that all of the defendants in the Brady cases admitted, at the time of their pleas, that they had engaged in acts constituting the crimes to which they were pleading.

The present case, to the contrary, is controlled by the principle that the right to rely on decisions, such as Rivera, which, if applied to the case of a defendant who had previously pleaded guilty, would have prevented the Government from prosecuting him for the statutory offense to which he pleaded (Robinson v. Neil, 409 U.S. 505 (1973); Blackledge v. Perry, 417 U.S. 21 (1974); United States v. Liguori, supra, 430 F.2d at 848-9, 85--52) or otherwise infected the "integrity of his conviction" (Bannister v. United States, 446 F.2d 1250, 1255 (3rd Cir. 1971) (en banc); see also "The Aftermath of Brady", supra, at 1443) is not waived by a guilty plea.

The present proceeding, unlike the <u>Brady</u> cases, involves the resolution of the scope of a criminal statute which would have prevented the Government from ever presecuting, or even indicting Smith for violating §2114. Certainly, had Mr. Smith known the real scope of §2114, as

clarified by <u>Rivera</u>, he would not have pleaded guilty to that offense. Moreover, it is now clear that the acts which Mr. Smith admitted at his plea proceeding do not constitute a viclation of §2114, the crime to which he was pleading guilty. Put otherwise, <u>Rivera</u> provided Mr. Smith with a "complete defense" to the charge that he had violated §2114. As such, this case is controlled by this Circuit's decision in <u>United States v. Liquori</u>, <u>supra</u>, 430 F.2d at 848-9.

## 2. The failure to appeal is not a waiver

It is clearly established that claims of constitutional dimension may be raised in a collateral proceeding even though the petitioner failed to raise them in a direct appeal. Davis v. United States, 417 U.S. 333, 345, n.15 (1974); Sunal v. Large, supra, 332 U.S. at 178-9 (1947); United States v. Travers, supra, 514 F.2d at 1176-7; United States v. Fischer, 381 F.2d 509, 512 (2d Cir. 1967); cf. Kaufman v. United States, 394 U.S. 214 (1969); United States v. Robinson, 361 U.S. 220, 230 n.14 (1960).

The two cases on which the Government relies for its claim that petitioner Smith waived his right to collateral proceedings by failing to take a direct appeal do not refute this principle. Sunal v. Large, supra, held only that a defendant is precluded from §2255 relief in those cases where he raised a non-constitutional issue at trial and then knowingly fails to raise that issue in a direct

appeal. In <u>Travers</u>, the Second Circuit noted only that it was leaving "for another day" the question of whether the <u>Maze</u> defense lacked constitutional dimension and therefore could not be raised by one who had failed to pursue it in a direct appeal.

Smith's petition raises three related constitutional claims. First, he asserts, and the Government does not dispute, that he was unaware when he pleaded that 18 U.S.C. §2114 was limited to offenses which had a postal nexus. As such, he pleaded without the requisite understanding of the nature of the crimes charged. McCarthy v. United States, 394 U.S. at 464-7; Irizarry v. United States, 508 F.2d 963-66 (2d Cir. 1974). It is beyond dispute that a clear understanding of the essential elements of a crime charged is fundamental to an "understanding of the nature of the charges." See e.g. McCarthy v. United States, supra, 394 U.S. at 467, n.20; Irizarry v. United States, supra, 508 F.2d at 965. It is equally clear that the requirement that a pleading defendant have such an understanding is of constitutional dimension. In speaking to this requirement, the Supreme Court stated in McCarthy v. United States, supra:

. . . A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege agaisnt compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process

Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.

(Id., 394 U.S. at 464-466. Footnotes omitted.)

Petitioner's second constitutional claim is that his plea was involuntary, and therefore obtained in violation of his Fifth Amendment rights to due process and against self-incrimination and his Sixth Amendment right to a trial by jury. The record of the proceedings in this case establishes that the mandatory 25 year sentence for aggravated assault under 52114 alleged in Court Two of the indictment had a coersive effect on petitioner's decision whether to plead guilty to Count One. (See Petitioner's Original Memorandum at 5-7). Since petitioner could not have been liable for that punishment, even if convicted, this coersion was improper, rendering his plea unvoluntary. (See Petitioner's Original Memorandum at 5-7). More generally, the fact that petitioner pleaded without an understanding of the crimes charged by itself rendered his plea involuntary. As the Supreme Court held in McCarthy v. United States, supra:

. . . because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of

the law in relation to the facts.

(Id., 394 U.S. at 466)

Petitioner's third constitutional claim rests on the fact that there was no factual basis for his plea to violation of §2114. At the plea proceedings, petitioner never admitted and the Government never offered proof that the robbery of Talton had a postal nexus. Indeed, even in its papers in this proceeding, the Government does not contest petitioner's claim that the robbery of Talton did not constitute a violation of §2114.

It is clearly established that a guilty plea is invalid unless the record of that proceeding establishes that there is a factual basis for every element of the offense to which the defendant is pleading. McCarthy v. United States, supra, 394 U.S. at 467; Seiller v. United States, supra; Irizarry v. United States, supra; See also Santobello v. New York, 404 U.S. 247, 261 (1971); United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974). Moreover, the absence of a factual basis for any element of the offense charged is a violation of constitutional dimension:

It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process.

(Vachon v. New Hampshire, 417 U.S. 478, 480 (1974))

See also Harris v. United States, 404 U.S. 1232, 1233 (1971), Chambers opinion of Douglas, J.: cf. Thompson v. Louisville, 362 U.S. 199 (1960); Johnson v. Florida, 319 U.S. 596 (1968); United States v. Liguori, 438 F.2d 663, 669 (2d Cir. 1971). Consequently, the fact that there was no factual basis for the element of postal nexus requisite to the violation of §2114 renders Smith's plea to that offense constitutionally infirm.\*

\*It is only in relation to this third claim that the Government's citation of the dicta in United States v. Travers, supra, has any relevance. In Travers, the Second Circuit left "for another day" the question of whether the Government's failure to prove mailings, a requisite to conviction under the mail fraud statute, was an issue of constitutional dimension. The Government, in its brief in this case, analogizes its failure to prove a postal nexus to the failure to prove mailings in Travers. It further urges that this Court should find that failure of proof to be non-constitutional and therefore not a proper subject for a §2255 applicant who failed to take a direct appeal.

Before analysing this question, it is important to realize that it relates only to whether petitioner Smith's third claim is constitutional. Consequently, even if this Court should determine that the absence of any evidence as to postal nexus is a non-constitutional issue, it would still be required to consider the merits of petitioner's first two claims — that his plea was involuntary, and that petitioner Smith entered the plea without the requisite understanding of the crimes charged.

Moreover, even as regards petitioner's third claim — the absence of a factual basis for the plea — petitioner submits that the question left open in Travers is inapplicable. Travers involved a collateral attack on a conviction after a trial in which the Government failed to introduce any evidence as to one element of the crime of which Travers was convicted. The present case, to the contrary, involves a guilty plea on the basis of a record containing no factual basis as to one element of the crime to which the defendant pleaded. The existence of a factual basis for a guilty plea is requisite to the validity of

Alternatively, Mr. Smith is entitled to raise his challenges by collateral attack even if they are non-consti-

(Footnote continued from preceding page)

that plea as a waiver of the defendant's constitutional rights to trial and due process. McCarthy v. United States, supra, 394 U.S. at 466. As such, it is itself an issue of constitutional dimension (id.), even if a failure of proof at trial were found not to be.

Furthermore, the question left unanswered in Travers must be resolved by a conclusion that the failure of the Government to submit any evidence as to one element of the crime charged is a violation of due process, whether this failure occurs at a trial or at a guilty plea proceeding. Liptscher v. United States, supra. Even in Travers, the Second Circuit took note of the fact that:

"It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process." Vachon v. New Hampshire, 417 U.S. 478, 480 (1974), quoting Harris v. United States, 1232, 1233 (1971) (chambers opinion of Douglas, J.).

United States v. Travers, supra, 514 F.2d at 1177.

See also Thompson v. Louisville, supra; Johnson v. Florida, supra; United States v. Liquori, supra. As such, the failure of the Government to prove an element of the crime charged is a constitutional issue which may be raised on collateral attack despite the defendant's knowing failure to take a direct appeal.

The Travers Court, in leaving this issue undecided, took note of what it believed to be an unresolved inconsistency between the Vachon line of cases and the Supreme Court's holding in Sunal v. Large, 332 U.S. 174 (1947). However, no such inconsistency exists. In Sunal, the only error which the petitioner was seeking to raise by collateral proceeding was that the trial court had refused to allow him to introduce evidence going to an affirmative defense. This, the Sunal Court held, was not an issue of constitutional dimension. The distinction between Sunal

tutional in dimension because he did not knowingly fail to raise them in direct appeal. A defendant is precluded

(Footnote continued from the preceding page)

and the present proceeding (see also Travers) is that in Sunal, unlike the present proceeding, the Government had proved every element of the crime charged. Consequently, Vachon, which concerns the Government's failure to prove an element of the crime, rather than Sunal, is controlling on the question of whether the issue being raised in the present proceeding is of constitutional dimension. Under Vachon it clearly is, and consequently Mr. Smith is entitled to raise this issue despite his failure to take a direct appeal.

Moreover, Sunal is distinguishable from the present proceeding and from Travers on a second ground. In light of the expansion of due process protections since 1947, when Sunal was decided (see Vachon v. New Hampshire, supra (1974); Harris v. United States, supra (1971); Thompson v. Louisville, supra (1960); Johnson v. Florida, supra (1968); United States v. Liguori, supra (1971), there is serious question whether the Supreme Court would still adhere to the theory of Sunal that the refusal of a trial judge to allow a defendant to introduce evidence going to an affirmative defense is not a violation of due process. The confusion of the Travers Court on this point arose from the fact that that Court assumed, erroneously, that the Supreme Court's recent decision in Davis v. United States, supra, re-affirmed that part of the Sunal decision which held that the issue raised in Sunal was nonconstitutional. To the contrary, Davis reaffirmed only that part of the Sunal decision which held that non-constitutional issues may not be raised in collateral proceedings by defendants who have intentionally failed to raise the issue first on direct appeal. Concerning the constitutionality of the issue raised in <u>Sunal</u>, the <u>Davis</u> Court did no more than confirm that in 1947 due process did not encompass that issue, thereby providing the basis for Sunal's denying collateral proceedings to the petitioner therein. Nothing in Davis may be read to imply that the limited definition of due process which existed in Sunal's day was still controlling in 1974. To the contrary, in light of Vachon, it seems likely that the issue raised in Sunal, if presented to the Supreme Court today, would be found to be of constitutional dimension.

from raising constitutional issues by collateral proceeding only if he made a knowing and intentional waiver of his right to take a direct appeal. Fay v. Noia, 375

U.S. 391, 439 (1963); Nash v. United States, 342 F.2d

366, 368 (5th Cir. 1965).\* The Government, in its brief in this case, does not contest petitioner Smith's claim that at the time he pleaded, he did not know that \$2114 was limited to offenses having a postal nexus. Consequently, he could not have made a knowing waiver of his right to raise that issue on direct appeal. Moreover, there is no evidence in the record that Smith was even aware of

The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464, is 'an intentional relinquishment or abandonment of a known right or privilege'—furnish the controlling standard.

(Fay v. Noia, supra, 373 U.S. at 439.

A Federal prisoner is clearly entitled to no lesser access to collateral proceedings, as the Federal courts have recognized in holding that

Fay v. Noia and Johnson v. Zerbst furnish the contolling standard in waiver situations for Federal prisoners seeking post-conviction relief under §2255.

(Nash v. United States, 342 F.2d 366, 368 (5th Cir. 1965)

<sup>\*</sup> In Fay v. Noia, 372 u.S. 391, 439 (1963), the Supreme Court held that a state prisoner who had failed to take a direct appeal from a judgment of conviction would be entitled to bring collateral proceedings in the Federal courts to challenge that conviction unless he had waived his right to take a direct appeal. The Court further held that:

his right to take a direct appeal from his guilty plea.

Absent such knowledge, he could not have made a knowing waiver of that right. He is therefore entitled to raise his present claims by collateral attack.

Alternatively, the merits of Mr. Smith's §2255 application should be considered despite his failure to take a direct appeal simply because "the ends of justice" (Sanders v. United States, 373 U.S. 1, 15 (1963)) would not be served by allowing a man who is not guilty of the charge to which he pleaded guilty, and who would not have pleaded guilty had he under stood the nature of those charges, to remain incarcerated on the basis of that plea.

## B. Petitioner Smith was prejudiced by the proceedings in this case.

The Government's second argument is that even if Smith is entitled to raise his claims under §2255, his claims are not meritorious. In response, petitioner will rely primarily on the arguments as to prejudice in his first memorandum and the claims of constitutional violation cited in the first section of this memorandum as establishing that his claims are meritorious.

Looking to the specifics of this claim by the Government, it argues first that petitioner is not entitled to relief becasue the Government could have had him plead to violation of \$641, which requires no postal nexus, instead of \$2114, which does require that element. Petitioner's

response to this statement is two-fold: First, the fact that the Government might have insisted on a plea to another count of the indictment is irrelevant. The relevant consideration is that the Government insisted that petitioner plead to violation of \$2114. Since that offense requires a postal nexus which does not exist in this case, petitioner pleaded guilty, and is currently serving a sentence imposed pursuant to a statute which he did not violate. Although the Government may have a ligitimate interest for seeking to punish Mr. Smith under some other statute, it has no legitimate interest for seeking to continue to punish him under a statute which he did not violate.

United States v. Liguori, supra, 430 F.2d at 849. Consequently, that sentence and guilty plea must be set aside.

Secondly, even if petitioner Smith had pleaded guilty to §641, the prejudice arising from the Government's improper indictment under §2114 would not be alleviated. The record establishes and the Government does not dispute petitioner Smith's claim that when he pleaded, it was with the belief that if he went to trial and was convicted of the robbery of Talton alleged in the indictment, he would be subject to the mandatory 25 year sentence for violation of the §2114 charged in Court Two. Since petitioner could not have been liable for such a sentence, even if convicted, his plea was involuntary and without requisite understanding

of the crimes charged. As such, it would have to be set aside even if he had pleaded to some other crime.

Finally, the Government argues that petitioner's plea could not have been improperly influenced by the mandatory 25 year sentence provided by Court Two since the Government stated at the time of the plea that it would not dismiss that count unless the defendant also cooperated with the Government. The fact that the Government attached two conditions to the dismissal of Count Two - guilty plea and dismissal - does not render that Count Two non-coersive. Petitioner still knew that one of the steps he would have to take to secure dismissal of Count Two was to plead guilty. Since the charge in count Two was improper, its coersive effect on petitioner's guilty plea rendered that plea invalid.

Respectfully submitted,

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MICHAEL YOUNG Of Counsel

December 19, 1975

1	UNITED STATES DISTRICT COURT
2	EASTERN DISTRICT OF NEW YORK
3	X
4	UNITED STATES OF AMERICA,
5	Plaintiff,
6	- against - 72 CR 672
7	CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON and A.C. DOYLE,
9	Defendants.
10	х
11	United States Courthouse
12	Erooklyn, New York
13	July, 17, 1972 10:60 A.M.
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15	Before:
16	HON. ORRIN G. JUDD, U. S. D. J.
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18	
19	
20	
21	
22	ILENE GINSBERG
23	OFFICIAL COURT REPORTER
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APPEARANCES: ROBERT MORSE, U.S. ATTY. EY: ROMALD DePETRIS, AUSA D. NIZEN, ESQ. Attorney for defendant Smith LEGAL AID SOCIETY BY: EDWARD KELLY, ESQ. Attorney for defendant Robertson ALAM LASHLEY, ESQ. Attorney for defendant Johnson 

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2 THE CLERK: U.S.A. v. Charles Smith, Herman 3 Robertson, Ronald Johnson and A.C. Doyle. 4 THE COURT: Should we hear this now? 5 MR. LASHLEY: I have an application for an adjourn-6 ment as to Mr. Johnson. 7 MR. DePETRIS: Your Honor, there will be a dispo-8 sition in this case as to all the defendants. 9 THE COURT: Well, if it is not disposed of -10 MR. DePETRIS: No. There will be a disposition. 11 THE COURT: Well, I can't hold the defendants to 12 that. It's up to the defendants. 13 MR. LASHLEY: Yes. Mr. Johnson informed me of a 14 disposition but ---15 THE COURT: Where is Mr. Smith? 16 MR. MIZEN: He was in our office last Friday but 17 he is apparently delayed today. I cannot contact him. His 18 phone has been disconnected. 19 THE COURT: Mr. DePetris, what about this? 20 MR. DEPETRIS: Well, your Honor, may we have a 21 second call? Then I can ask for a bench warrant. 22 THE COURT: You weren't happy about my reducing 23 the bail. 24 MR. NIZEM: Your Honor, I want to state that Mr. 25 Smith has been here whenever he was supposed to be here, when-

2 ever he was told to be here. 3 MR. DePETRIS: Yes, he has been in the Marshal's 4 office every Wednesday -- for whatever that's worth. 5 THE COURT: All right. I will have a second call 6 on that. 7 Mow, Mr. Kelly for Mr. Robertson. 8 MR. KELLY: The defendant offers to now plead 9 guilty to count five of this indictment, your Konor. 10 THE COURT: Is that the conspiracy count? 11 MR. KELLY: No, your Honor, theft of Government 12 funds. 13 THE COURT: Yes, 641. 14 Let me go through the requirements of Rule 11 on 15 this. 16 MR. DePETRIS: I wonder if we could handle Mr. 17 Lashley's adjournment first. 18 MR. LASHLEY: Your Honor, Mr. Johnson requests an 19 adjournment until July 26 which is a week from Wednesday. 20 THE COURT: Is Mr. Johnson in jail? 21 MR. LASHLEY: Yes. We are making a bail applica-22 tion. The Government is consenting to a reduction of bail. 23 THE COURT: All right. I connot try it if it is 24 not on the 26th. However, no one has a right to make him plead 25 guilty.

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2 What is the bail application? 3 MR. LASHLEY: It is ten thousand dollars now. The 4 application is to make it a ten percent cash bail on that ten 5 thousand dollars; in other words, if the defendant can raise 6 a thousand dollars in cash. 7 THE COURT: Well, do you consent to that, Hr. 8 DePetris? 9 MR. DePETRIS: Yes, your Honor. 10 THE COURT: You weren't happy when I made a smaller 11 reduction -- much more serious bail -- for Mr. Smith. This is 12 a serious charge against Johnson and Robertson both. They are 13 charged with having been in the hotel room and committing the 14 robbery, assisted or perhaps guided by Mr. Smith. 15 MR. DePETRIS: And Mr. Doyle. He is a fugitive. 16 THE COURT: All right. We will put the matter off 17 for adjournment for Mr. Johnson. 18 MR. LASHLEY: And the bail? 19 THE COURT: Yes. The bail is reduced. 20 Now, I want everybody here at ten o'clock on 21 Wednesday morning so I don't delay the jury. 22 MR. DePETRIS: Your Honor, Mr. Johnson's wife is 23 Would it be possible to arrange a visit? 24 THE COURT: Well, if he's going to raise bail --25 DEFENDANT JOHNSON: I'm not going to be able to

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raise bail today, your Honor. 3 THE COURT: All right. Let her see him. 4 All right, Mr. Kelly, with respect to the defen-5 dant Robertson. 6 Mr. Robertson, you are named as Herman Robertson. 7 Is that your true name? 8 DEFENDANT ROBERTSON: Yes. 9 THE COURT: How old are you? 10 DEFENDANT ROBERTSON: Twenty-five. 11 THE COURT: How far did you go through school? 12 DEFENDANT ROBERTSON: Eleventh grade. 13 THE COURT: Then you know enough to understand the 14 problem and you have discussed the matter intently. I take it, 15 with counsel? 16 DEFENDANT ROBERTSON: Yes sir. 17 THE COURT: Have you been currently or recently 18 treated by a doctor or psychiatrist? 19 DEFENDANT ROBERTSON: Yes. 20 THE COURT: What is the problem and how recently 21 have you been treated? 22 DEFENDANT ROBERTSON: Well, it was two months ago 23 -- put me in Methadone for five days and then cut me off. That's 24 it. 25 THE COURT: Were you in jail at that time?

2 DEFENDANT ROBERTSON: Yes, approximately two 3 months. 4 THE COURT: Was that the eight day Methadone 5 treatment? 6 MR. KELLY: Yes, your Honor. I think since that 7 time he has had no drugs at all. 8 THE COURT: Were you under any treatment at the 9 time you were arrested? 10 DEFENDANT ROBERTSON: No. just eight days --11 examined me and said I was all right. 12 THE COURT: Now, there is a five count indictment 13 against you. Did you have an opportunity to see that? 14 DEFENDANT ROBERTSON: Yes. 15 THE COURT: Do you want me to read it to you? 16 DEFENDANT ROBERTSON: If your Konor feels it's 17 necessary. I read it. 18 MR. KELLY: No. You can waive it. 19 DEFENDANT ROBERTSON: I will waive it. 20 THE COURT: You are offering to plead guilty to 21 the charge that you and other defendants stole money? Are you 22 ready to plead to such a charge? 23 DEFENDANT ROBERTSON: Yes. 24 THE COURT: Well, if you go to trial the Govern-25 ment has to prove your quilt beyond a reasonable doubt by

2 evidence on the stand and exhibits legally admissible. 3 You have a right to have counsel not only cross 4 examine the Government witnesses but you have the right to 5 produce witnesses on your own behalf and have subpoenas issued 6 to bring them into court if there are any such witnesses. 7 You begin with the presumption that you are 8 innocent of the crime. You have to be found guilty by a unani-9 mous vote of twelve jurors or by the Court on the same determi-10 nation of proof beyond a reasonable doubt if you and the Govern-11 ment waive the jury. 12 Do you understand those rights? 13 DEFENDANT ROBERTSON: Yes. 14 THE COURT: A penalty for violation of Section 641 15 is a fine of not more than ten thousand dollars or imprisonment 16 of not more than ten years or both. Do you understand that? 17 DEFENDANT ROBERTSON: Yes sir. 18 THE COURT: If you are sentenced I presume the 19 Government will move to dismiss the first four counts which carry 20 a cumulative penalty including one count which is a mandatory 21 sentence of twenty-five years. 22 Apart from this dismissal of the other counts, were 23 there any promises made to you to induce you to plead guilty? 24 DEFENDANT ROBERTSON: Just when I go for sentence 25 they could take my cooperation into consideration. No promises.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

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2 THE COURT: Yes. I think Mr. DePetris mentioned 3 that in my chambers before. I mean, apart from that. 4 How, you might get a mandatory twenty-five years. 5 Have there been any threats to induce you to plead guilty? 6 DEFENDANT ROBERTSON: No. 7 THE COURT: Are you under any medication or phys-8 ical ailment today that impairs your power to make a decision? 9 DEFENDANT ROBERTSON: No. 10 THE COURT: Nobody has promised you the extent of 11 my consideration with regard to your cooperation? 12 DEFENDANT ROBERTSON: No. 13 THE COURT: It is still a serious crime. 14 Has anyone made any promises to you as to sentence? 15 DEFENDANT ROBERTSON: No. 16 THE COURT: Were you one of those who actually took 17 the five thousand dollars? 18 DEFENDANT ROBERTSON: Yes. 19 THE COURT: Mr. Defetris, have you satisfied Mr. 20 Kelly that it was Government money? 21 MR. DePETRIS: Yes, your Honor. 22 THE COURT: Mx. Kelly, is there any reason why 23 the plea should not be accepted? 24 MR. KELLY: No. Judge. 25 THE COURT: Mr. Robertson, knowing the potential

penalty and the rights you have, do you still wish to plead 2 guilty? 3 DEFENDANT ROBERTSON: Yes sir. 4 5 THE COURT: All right. I find that the plea has been made knowingly, 6 that there is a basis in fact for accepting the plea and I 7 will accept it. 8 MR. KELLY: Your Honor, there is now a ten thousand 9 dollar surety bond existing. If it was reduced to ten percent 10 cash - I spoke with the Assistant United States Attorney and 11 I don't believe he would oppose a reduction. 12 13 THE COURT: All right, Mr. DePetris. 14 MR. DePETRIS: That's correct, your Honor. 15 THE COURT: I suppose the probabilities are that 16 I will impose some jail sentence when this comes up and jail time will be counted against sentence. But, I suppose West 17 18 Street isn't as good as Danbury or Louisburg. 19 MR. DePETRIS: I believe the defendants know that 20 but they wish to make the bail application. 21 THE COURT: All right. I'm sure your client 22 realizes that if he fails to appear in court that is a separate 23 offense. 24 MR. KELLY: Yes, your Honor. 25 THE COURT: Well, I'm not sure if MARA is an

MR. DE PETRIS! VOUR HONOR ME CEILL IN

2 appropriate thing. It is not an armed robbery count although 3 the offense is an armed robbery offense. 4 The pre-sentence report will take up until some 5 time in September. You will be notified, Mr. Kelly, and I 6 will expect you to notify Mr. Robertson. I will expect you to 7 be here. 8 (Recess taken) 9 (After recess) 10 DEFENDANT SMITH: Your Honor, I stopped to get 11 cigarettes and locked the car. When I came out I didn't have 12 the keys. I had to get another set of keys. I had rented a 13 car. 14 MR. DePETRIS: I believe at this time your Honor, 15 the defendant wishes to withdraw his plea of not guilty to 16 count one and offer a plea of guilty to count one of the 17 indictment. 18 MR. NIZEM: That's correct. 19 THE COURT: I will ask the questions required 20 under -- wait a minute -- count one, that's a twenty-five year 21 count. 22 MR. DePETRIS: Counts one and two are the robbery 23 and aggrevated robbery count one, is zero to ten --24 THE COURT: Ch, yes. 25 So, you are pleading guilty to count one?

MR. DePETRIS: He is, that is correct, your Honor. 2 THE COURT: Mr. Smith, you are named in the indict-3 ment as Charles Smith. Is that your right name? DEFENDANT SMITH: Yes sir. 5 THE COURT: How old are you? 6 DEFENDANT SMITH: Twenty-nine. 7 THE COURT: How far have you gone through school? 8 9 DEFENDANT SMITH: I graduated from high school. THE COURT: So, you know enough to understand what 10 is involved and to talk with your attorney about it. 11 12 DEFENDANT SMITH: Yes sir. 13 THE COURT: Have you recently been under the care of a doctor or psychiatrist? 15 DEFENDANT SMITH: No sir. 16 THE COURT: Have you been hospitalized or treated 17 for narcotic addiction? 18 DEFENDANT SMITH: Yes sir. 19 THE COURT: How recently? 20 DEFEMBANT SMITH: When I got arrested, sir. 21 MR. MIZEN: Not for narcotics addiction. Maybe 22 he misunderstood --23 DEFINDANT SMITH: When I was arrested I was on the 24 Methadone program. 25 MR. NIZEW: I'm sorry, your Honor. He is right.

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2 imprisonment for not more than ten years. 3 DEFENDANT SMITH: Yes sir. 4 THE COURT: Are you acting of your own free will? 5 DEFENDANT SMITH: Yes. 6 THE COURT: If you did not plead guilty you could 7 go to trial today and the Covernment would have to prove your 8 quilt beyond a reasonable doubt by such exhibits and evidence 9 and testimony as would be admissible and which testimony would 10 be subject to cross examination by your own attorney. 11 You start with the presumption of innocence and 12 you have to be found guilty beyond a reasonable doubt by a 13 unanimous vote by the jury or by a decision of the Court if you 14 waive a jury. 15 You may also have your own witnesses subpoensed 16 by your attorney. 17 Now, you have been promised that if you plead guilty 18 on the first count that the other counts will be dismissed --19 MR. DePETRIS: Your Honor, there is a caveat to 20 that which I would like to place on the record. There is no 21 one else in the courtroom. 22 We will accept the plea with the caveat that Mr. 23 Smith will aid us in certain various ways including helping us 24 to get involved with other narcotics dealers and his helping 25

us to locate the fugitive, Doyle.

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The Government will only dismiss the twenty-five year count if the Government is satisfied that he is serious in his cooperation and that he does so with seriousness and earnestness.

If it turns out that the defendant cannot do what he says he can do, then the Government will make no commitment with regard to the other counts.

MR. NIZEM: Your Honor, there is an outstanding matter in the District Court. There is no indictment at this moment. It is agrecedent agreet going back to April of this year. If Mr. Smith cooperates it is my understanding that the Government will not prosecute regarding that matter.

MR. DePETRIS: There was a prior arrest of this defendant, no indictment as yet. It is still pending in the complaint stage.

Again, if the Government is fully satisfied that Mr. Smith is cooperating and doing everything he can, the Government will also accept this plea to the count here in satisfaction --

MR. DePETRIS: Yes, your Honor -- possession with intent to distribute under Section 841.

THE COURT: Well, I don't want to keep this matter open for a long time. It takes six or eight weeks to

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get a pre-sentence report. Will you have your determination 3 about cooperation by the end of that time? MP. DePETRIS: I should think so. We should have 5 a re sonable idea by then. 6 THE COURT: Yes. 7 MR. MIZEN: I'd like to indicate that we have been 8 discussing certain aspects of Mr. Smith's cooperation with the 9 Government and agents present this morning --10 THE COURT: Yes. I think it was 11:15 when I was 11 told Mr. Smith arrived and it is now 12:15. 12 Now, you heard what was said about promises by the 13 Government and expectations of what you will do. 14 Other than what is on the record now, were any 15 other promises made to induce you to plead guilty? 16 DEFENDANT SMITH: That if I cooperate they would 17 withdraw that count and enter possibly a lesser count, if I 18 cooperate. 19 MR. NIZEN: This was something that I had raised. 20 I just spoke to Mr. DePetris about it again. 21 In all cander, I suggested that if his cooperation 22 is so valuable that there may be a possible -- but Mr. DePetris 23 indicated to me that it is very remote -- that the Government 24 would allow him to substitute for the ten year count a count 25 carrying less punishment than ten years. BEST COPY AVAILABLE

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THE COURT: I don't know if there is any plea that takes less but that is very unusual --

MR. DePETRIS: Your Honor, I want to make it clear that I told Mr. Misen it was extremely unlikely and remote and that it was very unusual and as far as the purposes of the plea were concerned, that it was not to be part of the plea bargaining because it was an extremely unlikely possibility. But, I said to Mr. Mizen if Mr. Smith were to give us the number one narcotic dealer in the United States them possibly the Government would consider consenting to a zero to three count.

THE COURT: Well, I don't know but I think if there is going to be a plea here it should be --

MR. MIZEM: Your Honor, there is a plea here, no doubt about it.

THE COURT: Mr. Smith, other than the risk of going to jail for twenty-five years if you are found guilty on trial, other than that consideration, has anyone forced you to plead guilty?

DEFENDANT SMITH: No sir.

THE COURT: Has anyone made any promises to you with regard to what type of sentence I would impose?

DEFENDANT SMITH: No sir.

MR. DePETRIS: Would your Honor advise him of the

maximum penalty? You mentioned the jail term. I want to be careful on the record. There is a possible fine.

THE COURT: 2114 states that for the first offense there shall be imprisonment of not more than ten years. There is no fine.

MR. DePETRIS: I beg your pardon. I just assumed there was a fine.

THE COURT: Tell me what you did.

You are charged under that count and Section 2 which states that anybody helps commit a crime is guilty as though he had committed the crime himself.

MR. DePETRIS: That is the Government's theory in this case; that the defendant aided and abetted, counseled and planned --

THE COURT: Can you tell me what you did, please?

DEFENDANT SMITH: Outside the hotel I told them

there was someone in the room with a large amount of money;

that there was a drug dealer in room 116 and then I left and

I imagine they proceeded inside to commit the robbery.

THE COURT: You told them he was there and that he had money and you expected that they would go in and rob him, didn't you?

DEFEMDANT SMITH: Yes sir.

THE COURT: All right.

2 Is there anything else that should be known to me 3 NOW ? 4 MR. DePETRIS: Well, the only other thing I can 5 think of is that part of the charge of robbery also includes 6 an assault element. It doesn't have to be with putting life 7 in jeopardy but it does include a cortain amount of force 8 involved. 9 MR. MIZEN: Your Honor, Mr. Smith has not been 10 charged with that. 11 THE COURT: He is being charged with helping in 12 the robbery. 13 MR. DePETRIS: Perhaps some indication should be 14 made that some force would be used. 15 THE COURT: Did you expect they would have trouble 16 getting it from the party or parties involved? 17 DEFENDANT SMITH: I didn't know exactly what they 18 was going to do, what means they would take to get it or if they 19 would take it at all. I just supplied information. 20 THE COURT: Did you think they would make threats 21 in order to get the money from him? 22 DEFENDANT SMITH: I imagine so, your Honor. 23 THE COURT: All right. 24 Mr. Mizen, is there any reason why the plea should 25 not be accepted?

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MR. HIZEN: No. I recommend the acceptance of the ples.

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THE COURT: I find the plea was made voluntarily with the knowledge of the defendant's rights and the knowledge of the consequences and that there is a basis in fact for the plea and I will accept it.

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I presume we want a pre-sentence report here?

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MR. MIZEN: Yes.

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MR. DePETRIS: Yes, your Honor.

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THE COURT: All right. You will be notified and you will be expected to be here at the time of sentence.

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MR. DePETRIS: Your Honor, as to bail, the Govern-

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ment has no objection to continuing the bail.

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THE COURT: What's twenty-five thousand dollars

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surety at the present time?

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MR. DePETRIS: Yes.

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One other element, there were various conditions set along with the bail the last time, one being that the de-

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fendant was to report on every Wednesday to the United States

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Marshal in the Eastern District of New York. The Government

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will consent to revising that condition such that the defendant

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report to the agents of the B.N.D.D. once every other day.

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THE COURT: I don't know if that has to be put on the record.

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MR. DePETRIS: I think it is on the record, your Honor.

THE COURT: All right. He has reported thus far and is complying with bail and I presume he will still do so. DEFENDANT SMITH: Yes sir.

THE COURT: Mr. Mizen will be notified of the sentence time. He will tell you and you will have to report then.

Good afternoon, gentlemen.

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3	EASTERN DISTRICT OF NEW YORK
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5	UNITED STATES OF AMERICA, :
6	-against- : 72-CR-672
7	CHARLES SMITH, :
8	Defendant. :
9	x
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11	United States Courthouse Brooklyn, New York
12	January 23, 1973
13	2:00 o'clock p.m.
14	
15	Before:
16	HONORABLE ORRIN G. JUDD, U.S.D.J.
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19	FOR SENTENCE
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21	the foregoing is a
22	I hereby certify that the foregoing is a true and accurate transcript from my stem this properties.  EMANHERATE TARR
23	EMANHER TRARR
24	OFFICIAL COURT REPORTER Official Court Reporter Official Court Reporter
25	Official Court Report  U.S. District Court

Continue.

Appearances:

ROBERT A. MORSE, ESQ.
United Statts Attorney
for the Eastern District of New York

BY: RONALD DE PETRIS, ESQ.
Assistant U.S. Attorney

LESLIE NIZIN, ESQ.
-andALLEN STURIM, ESQ.
Attorneys for Defendant

THE CLERK: For sentence, United States of 2 America against Charles Smith. 3 MR. DE PETRIS: Your Honor, Mr. Smith has been 4 brought up but he hasn't had an opportunity to speak 5 to his attorneys. 6 THE COURT: All right, I will wait a few 7 minutes. 8 MR. DE PETRIS: Perhaps that would be a good 9 idea. 10 (A ten minute recess was then taken.) 11 THE COURT: Are we ready to have the defendant 12 brought out? 13 MR. STURIM: Yes, your Honor. 14 Your Honor, may I approach the bench in this 15 matter? 16 THE COURT: Yes, all right, come up here, come 17 around here. 18 (The following occurred at side bar.) 19 MR. STURIM: If the Court please, as you know, 20 the defendant has now been brought in on a warrant, 21 although he understands that this is the sentencing, 22 but two things have occurred in the interim that have 23 been brought to our attention and I think we ought 24 to discuss them with the Court. 25 Number one, we find, according to the defendant's

1 statement to us in jail that he is currently addicted 2 to drugs and he was when he was apprehended yesterday 3 even by Federal officers that he had a quantity of 4 heroin, I don't know how much it was, and he was high 5 in his appearance to the officers at the time he was 6 taken into custody. I have spoken with him in jail now and he tells 7 8 me he has an extensive heroin habit. Now, the reason I thought we would approach 9 the bench at this time is there is a Federal procedure 10 for a drug rehabilitating sentence in appropriate 11 situations. 12 I don't know whether anything that your Honor 13 had in your probation report on this prisoner reflects 14 upon this drug condition. 15 THE COURT: It shows he has a heroin habit 16 but I have discretion and I would not exercise it here 17 to give him a 4244. 18 19 MR. DE PETRIS: I am not sure he would even be eligible since there is a claim of violence. 20 THE COURT: I don't think he pleaded to a violent 21 crime. 22 MR. DE PETRIS: The ten count is an assault 23 count so it does include violence, I believe. 24 MR. STURIM: The only additional item is that 25

the United States attorney had brought to your time of sentence. MR. DE PETRIS: Your Honor, you will recall

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attention that he had intentions of either charging the defendant with additional counts of bail jumping, and in lieu of this, if the defendant would not enter a plea of guilty, that he would prosecute him on the open 25-year count that was to be dismissed at the

THE COURT: I'm going to sentence on one and leave the other one open for prosecution.

that at the time of the plea we were all set and ready to go to trial and an agreement was placed squarely on the record, and we were skeptical about the defendant's offer of cooperation, an agreement was placed squarely on the record that we would not dismiss the 25-year count at the time of sentence unless he fully cooperated with the United STates. In the meantime, he has done nothing, so --

THE COURT: According to the presentence report he stated that he was not guilty, that he pleaded guilty on the attorney's advice in order to avoid the 25-year sentence.

MR. DE PETRIS: That is another thing on which we should get the fact basis clear.

THE COURT: If you are going to consider at any

1 time any motions to withdraw the plea, now is the 2 time. 3 MR. STURIM: I appreciate that, Judge, no, I 4 am thinking more in terms with respect to cooperation, 5 he tells me that in fact he did cooperate with the 6 authorities, he tells me he was present when they 7 introduced this officer to one by the name of Johnson 8 at a motel and also that he introduced him to a man 9 by the name of Joe Kelly. 10 MR. DE PETRIS: Your Honor, Mr. Smith's 11 cooperation as far as the Government is concerned has 12 been nil, and it was made very lcear on the record 13 at the time of the plea that Mr. Smith was not to be 14 the judge of whether his cooperation was worth 15 anything. We were skeptical about it then. 16 THE COURT: He can have a hearing on his 17 cooperation, if he wants. 18 MR. DE PETRIS: There is no necessity for it. 19 THE COURT: It is a serious crime whether 20 there is cooperation or not, you would need an awful 21 lot to wipe that out. 22 MR. STURIM: I realize that, we don't expect 23 that that will wipe it out entirely but it may tend 24 to mitigate the sentence. 25 MR. DE PETRIS: The Government has offered a

disposition to the defendant that, although under the agreement made at the time of the plea, we were entitled to move forward and prosecute the whole indictment, but the Government offered the defendant if he were willing to plead to the ten-year count, which he pleaded, plus the additional count of bail jumping, but then we would move to dismiss the 25-year count. MR. STURIM: The concern that I have and what I wish to discuss with him at this point because he obviously expects to be sentenced on the 10-year

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count, and I think that the family was extremely cooperative in asking that the defendant be taken into custody --

THE COURT: They had a right to be, every reason to be. I have been concerned about the fact that I let him out on the security of his parents' home and he didn't show up.

MR. STURIM: And I think in connection with the bail-jumping sentence, my inquiry would be whether that will be move severe and over and above what the sentence would be here in connection with the ten-year count.

THE COURT: Well, I don't really promise you those things beforehand. Ten years is a long time.

1 MR. STURIM: Okay. 2 The only other thing I am concerned about --3 THE COURT: Have you an information on the 4 bail jumping? 5 MR. DE PETRIS: My secretary is typing it. 6 THE COURT: Have you talked to him about it? 7 MR. STURIM: I think we have started to. 8 THE COURT: I think you had better talk to him 9 about that. 10 MR. DE PETRIS: On the question of the bail, 11 your Honor, the Government does not intend to move 12 for a forfeiture of any of the bail. 13 THE COURT: All right. 14 MR. STURIM: One other thing, I realize that 15 this is in there that the family had cooperated, but 16 they have attempted to keep any information of their 17 cooperation from being public knowledge. 18 THE COURT: Strike it all out of the record, 19 don't type it. 20 MR. STURIM: I appreciate that. 21 THE COURT: There really isn't anything too 22 confidential in the probation report, if you want to 23 look at it, it has statements by the agents as to 24

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their belief that he is a widespread seller of narcotics, but from my point of view what he did in

1 this one instance is enough to justify the ten years 2 without all the elaboration. 3 MR. DE PETRIS: Mr. Smith has admitted dealing 4 in one to two kilos per week. 5 THE COURT: He denied, according to the probation report, he denied this offense but he has 6 admitted to selling ten kilos over a period of time. 7 MR. DE PETRIS: Substantially more than that 8 9 he has admitted to the agents. THE COURT: We will take a short recess. 10 Let me know when you are ready and I will let 11 12 you look at this. MR. STURIM: Thank you very much. 13 MR. NIZIN: Thank you. 14 (The Court handed the probation report to 15 16 Mr. Sturim.) THE COURT: We are going to take a short 17 recess for defense counsel to confer further with 18 19 Mr. Smith. MR. NIZIN: Thank you very much. 20 (A recess was taken until 3:00 o'clock.) 21 THE COURT: Mr. Sturim, are you going to speak 22 on behalf of the defendant? 23 MR. STURIM: I will, your Honor. 24 THE COURT: There is the return of a bench 25

2 Now when the defendant did not appear for sentence on September 15th, well, and that other 3 matter, we discussed it at side bar and it is going 5 to be taken up now? MR. DE PETRIS: Yes, yes, your Honor. 6 MR. STURIM: If the Court please, at this time 7 the defendant will plead guilty to an information to 8 which he has just been furnished a copy, charging the 9 defendant with bail jumping. 10 THE COURT: I suppose first we need a waiver 11 12 of indictment on this? MR. DE PETRIS: Yes, your Honor. 13 THE COURT: This is -- what is the section? 14 MR. DE PETRIS: Section 3150 of Title 18. 15 THE COURT: Since the charge was a felony, 16 the bail jumping is a felony, too. 17 MR. DE PETRIS: I have the waiver of indictment 18 19 here, your Honor. 20 THE COURT: All right. Well, let me go forward with the questioning 21 of Mr. Smith. 22 Your name is Charles Smith? 23 24 DFTENDANT SMITH: Yes. 25 THE COURT: How old are you?

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THE COURT: How far did you go through school? 2 DEFENDANT SMITH: I finished. 3 THE COURT: You finished what? 4 DEFENDANT SMITH: High school. 5 THE COURT: So you are intelligent enoughto understand what the charges against you and to talk 7 8 to counsel about it? DEFENDANT SMITH: Yes, sir. 9 THE COURT: Are you satisfied with Mr. Sturim 10 11 as your counsel? DEFENDANT SMITH: Yes, sir. 12 THE COURT: Apart from a narcotic problem, 13 have you been under the care of a doctor or a 14 15 psychiatrist? DEFENDANT SMITH: Not recently, no. 16 THE COURT: Have you had any drug or medication 17 18 today? DEFENDANT SMITH: No. 19 THE COURT: Didn't they give you methadone? 20 DEFENDANT SMITH: Last night, yes. 21 THE COURT: Have you talked with the defendant 22 enough to know that he is in possession of his 23 faculties today, Mr. Sturim? 24 MR. STURIM: Yes, I have, and he is in 25

possession of his faculties and is able to communicate effectively with me and I with him. THE COURT: I understand from the side bar that he was high and under narcotics last night? MR. STURIM: That is correct. THE COURT: I understand that that does not necessarily mean that a man cannot know what he is doing. Now, since you did not appear on September 15 and presumably when notified, you are being charged with a violation of Section 3150 of Title 18, which says: 

"Whoever, having been released pursuant to
this chapter, wilfully fails to appear before any
court or judicial officer as required, shall, subject
to the provisionsof the Federal Rules of the Criminal
Procedures, incur a forfeiture of any security which
was given or pledged for his release, and, in addition,
shall, (1) if he was released in connection with a
charge of felony, or while awaiting sentence or
pending appeal or certiorari after conviction of any
offense, be fined not more than \$5,000 or imprisoned

Now, you would have a right to require that this matter be presented to a grand jury, and there

not more than five years, or both."

2 evidence and decide whether there was probable cause 3 to believe you guilty. 4 Now if you waive indictment, the case will 5 proceed just as if there had been a grand jury 6 indictment. 7 Have you discussed the waiver of indictment 8 with your counsel? 9 THE DEFENDANT: Yes. 10 THE COURT: Have any threats or promises been 11 made to induce you to waive indictment? 12 DHE DEFENDANT: No, sir. 13 THE COURT: Is there any reason why this should 14 not be done, Mr. Sturim? 15 MR. STURIM: There is none, your Honor. 16 THE COURT: I think the defendant knows what 17 his rights are and is acting voluntarily, and I will 18 accept the information if the waiver of indictment is 19 signed. 20 (At this point the defendant signed the 21 waiver of indictment.) 22 THE COURT: Are they all signed? 23 MR. STURIM: Mr. Smith has signed those copies, 24 your Honor. 25 THE COURT: All right.

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(At this point Mr. Sturim signed a copy.) 3 (The Clerk witnesses it.) THE COURT: Now, Mr. Smith, this information 5 charges that on or about September 22nd, within this 6 district, having heretofore been arrested on charges 7 of violating Sections 111, 641, 2114 and 2 of Title 18 of 8 the United STates Code, which related to the theft 9 of money from a Federal agent, and having been 10 released pursuant to the provisions of Section 3146(a) 11 (4) of Title 18 on a bail bond in the sum of \$25,000 12 for your appearance in Court in connection with the 13 charge; 14 And being then and there required to appear 15 in this court; 16 You wilfully and unlawfully failed to appear 17 as required. 18 I have described the penalty but you would still 19 be entitled to a trial even though you waived indictment, 20 if you wish a trial, at which time you would be given 21 the benefit of defense by counsel, who, if you can't 22 pay them, would be paid by the Government, and a jury 23 would have to find you guilty beyond a reasonable 24 doubt by a unanimous vote, starting with the presumption 25 of your innocence:

Let me see a copy of the information, please.

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2 could be tried by the Court, still with the requirement 3 of proof beyond a reasonable doubt and the right to bring in witnesses on your own behalf to show that 5 there was not any wilfullness and to cross-examine any 6 witnesses on behalf of the Government. 7 You know you have all of those rights? 8 THE DEFENDANT: Yes. 9 THE COURT: And that it was a wilful refusal 10 to appear which would need to involve you in any guilt. 11 Now, I think there has been some representation 12 by the Government to me with respect to its intentions 13 about the bail, and I think that that should be on 14 the record. 15 I don't know whether it is a promise to the 16 defendant but it is a circumstance --17 MR. DE PETRIS: It is not a promise to the 18 defendant, your Honor, but the Government does not 19 intend to move for forfeiture of the bail and as such 20 places the statement on the record. 21 THE COURT: All right. 22 Have any promises, threats or promises, been 23 made to induce you to plead guilty to the bail-jumping 24 information? 25 THE DEFENDANT: No.

2 will be? 3 THE DEFENDANT: No, sir. 4 THE COURT: And are you pleading guilty because 5 you did in fact fail to appear? 6 THE DEFENDANT: I did in fact. 7 THE COURT: I know you failed to appear. 8 Why did you not appear, didn't you know you 9 were supposed to be here? 10 THE DEFENDANT: Yes, sir. 11 THE COURT: So it was a wilful failure to 12 appear? 13 THE DEFENDANT: Yes. 14 THE COURT: All right. 15 Mr. Sturim, is there any reason why the plea 16 should not be accepted? 17 MR. STURIM: No, there is none, your Honor. 18 THE COURT: Mr. DePetris, is there anything else 19 I should know? 20 MR. DE PETRIS: No, your Honor. 21 THE COURT: All right. 22 Well, I find that the plea has been made 23 voluntarily, with knowledge of the defendant's rights 24 and of the consequences of the plea, and I will accept 25 it.

I will now proceed to sentence on both matters, right now.

MR. STURIM: That is fine, your Honor.

THE COURT: All right.

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MR. DE PETRIS: Your Honor, before proceeding to sentence on both matters, I was wondering whether your Honor would want to clarify the fact bases for the plea for the original indictment, especially in view of the protestations of innocence to the Probation Officer.

THE COURT: The presentence report which I have made available to defendant's counsel and which they have just returned states the offense and states that he pleaded guilty on the advice of his attorney and if convicted he faced 25 years. Of course, as I read the statute, there was a mandatory 25 year sentence if he were convicted of participation in the armed robbery of a Federal agent, and there is going to be a substantial prison sentence and if the defendant wants to withdraw his plea and go to trial now, this is his last opportunity to make that request. I am not sure I would grant such an application because I have heard guilty pleas from the other three defendants in the case, and from all that I have learned I think that a jury would convict this defendant.

But, Mr. Sturim, is there any application by 2 the defendant on a motion to withdraw the plea? 3 MR. STURIM: There is none, your Honor. THE COURT: All right. 5 Is there any other reason why sentence should 6 not be imposed? 7 MR. STURIM: There is none. 8 MR. DE PETRIS: Your Honor, just one additional 9 thing --10 THE COURT: Yes. 11 MR. DE PETRIS: This is within your Honor's 12 discretion: 13 As you will recall, the statement, the fact 14 basis for the plea at the time of the plea, well, 15 the defendant was very equivocal about his involvement 16 in the case and denied masterminding it and said all 17 he did was tell the other three people that there was 18 money in the room without any intention to participate 19 in it or aid the robbery. 20 Now that is completely in contrast with the 21 evidence, and I would just like that clarified, 22 within your Honor's discretion. 23 THE COURT: Wall, I would think if he told 24 them that there was an agent there with money, it 25 was participation.

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You knew at the time, Mr. Smith, that your co-defendants, Mr. Doyle and Mr. Robertson and Mr. Johnson were going to go in and take the money that this agent had: did you not?

(continued next page)

THE DEFENDANT: I didn't know. The agent 2 was there with another fellow who was in the room, 3 that I knew --4 THE COURT: You knew he had some money? 5 THE DEFENDANT: Yes. 6 THE COURT: You intended that they would get 7 the money from him; is that right? 8 THE DEFENDANT: Yes, your Honor. 9 MR. DE PETRIS: Thank you, your Honor. 10 THE COURT: The pre-sentence report also 11 states that the defendant had admitted that he had 12 sold a total of 10 kils of heroin since 1971 in 13 order to satisfy his own habit. 14 To some extent an addict seller of heroin is 15 not as guilty of as serious an offense as a non-16 addict seller, but when he turns around and deceives 17 the agent, that is a serious crime in itself, and I 18 think the attempt to escape punishment by running 19 out is another serious matter. 20 Now I thought I was going way out on a limb, 21 and I know I was acting against Mr. De Petris's 22 advice, when I accepted bail and let Mr. Smith be 23 released on the security of his parents' home, and 24 I think it is a serious indication of his character 25 that he risked their home in that way.

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moment.

But, Mr. Sturim, you may say anything you want on behalf of the defendant.

MR. STURIM: Judge, I think that essentially your Honor's comments with respect to the defendant is part of this man's problem, his vacillations and almost immature kind of thinking that an addict does go through, I think this essentially is to gratify their own needs immediately, and they think of their responsibilities to this Court in this case and to their own family secondly.

As your Honor has already given indication, there was in fact observation by the officers apparently when he was picked up that he was in fact under the influence of narcotics at that very moment.

I can also indicate to the Court, and I think it will be verified by everything that has happened, that this defendant had been in touch with my office directly approximately one week ago and had initiated the contact to my office with the idea of coming voluntarily before the Court. There were a continuous series of discussions, we had telephone conversations with Mr. Smith almost every day since the initial phone call, and it was all towards that end.

So I think it wasn't initially a willful act

upon his part, I think he realized that nevertheless he had an obligation to the Court and he intended at one point to come in. But the interception and the needle and the use of drugs I think probably blurred his thinking at that time.

other remark which I would like to comment upon.

Of course, you said that when he deceives federal officers and this in the course of his own drug use, of course you know that at the time -- and I don't say that this is a legal defense to these charges -- but he of course had no idea that there were any federal agents or agent involved in any part of this transaction.

THE COURT: I suppose that is so, and it could be either way, it could be that he was trying to deceive people that he thought were drug purchasers.

MR. STURIM: That is what I think.

THE COURT: Or he knew that they were agents and he decided that he would doublecross them.

But I will assume your statement of fact.

MR. STURIM: That I believe is consistent with the facts as I know them, as is based upon my discussions with Mr. Smith.

MR. DE PETRIS: That would also be consistent

with what the Government knows, consistent with the reputation that this defendant has on the street of being a doublecross artist.

MR. STURIM: In any event, if the Court pleases, I would respectfully ask the Court to consider the fact of his addiction, the fact of his age, the fact that he is married and he did not directly participate in any violent act. I don't think he anticipated the kind of violence that may have taken place in the room at all. I assume that he felt that it would be relatively an easy matter of relieving these people of that money and the others to leave the room at that time without difficulty.

Again, I don't think that Mr. Smith in these circumstances thought at all of the possible circumstances; as I understand it, there was no serious injury to anybody involved.

I would ask your Honor to be as lemient as possible in terms of sentence.

The fact of his failure to appear in Court,
well, in view of the fact that he made a sincere
effort to get himself in Court on a voluntary basis,
I ask your Honor not to consider that.

Under all the circumstances, I can onlyask

your Honor to recognize that the maximum sentence which I know your Honor can impose of 10 years is one of great length, and Iwould ask your Honor to be as lenient as possible and to take these other circumstances into consideration.

THE COURT: Mr. Smith, do you want to say anything on your own behalf or in mitigation of punishment?

THE DEFENDANT: Yes.

I was intending to come into Court today, I called my lawyer yesterday and I told him I was going to make an appointment to turn myself in today.

THE COURT: All right.

Well, I suppose you realize you can't run away forever.

THE DEFENDANT: Yes, sir.

THE COURT: It is very hard to do that.

It still is a serious offense and I think from my point of view you were not only more responsible than the others, but you have a background of heroin sales that I think makes it particularly a serious matter, and that I can consider in this context.

I think you got a concession from the Government when they accepted a plea to the 10-year count instead of the 25-year count, and I am going to

MR. DE PETRIS: Your Honor --3 THE COURT: What is that? 4 MR. DE PETRIS: Before sentence is imposed, 5 your Honor, there are a couple of things that I 6 would like to state on behalf of the Government. 7 THE COURT: All right. 8 MR. DE PETRIS: Just to clarify some of the 9 matters which were stated in mitigation of sentence, 10 the defendant Charles Smith had admitted to the acts 11 and I believe that is in the Probation Report, that 12 is that he was dealing in one to two kilograms of 13 heroin per week. 14 THE COURT: I read about 10 kilos --15 THE DEFENDANT: It is a mistake. 16 THE COURT: Wait a minute. 17 THE DEFENDANT: That was a mistake. He asked 18 me, I told him one or two ounces a week, and he said 19 over a p eriod of three years it would be 10 kilos, 20 it was not two kils a week --21 THE COURT: 10 kilos a week is a lot of heroin, 22 I mean 10 kilos in --23 THE DEFENDANT: Over a period of 3 weeks, 24 he has there. 25 THE COURT: 3 years.

a week.

MR. DE PETRIS: May I finish my statement, your Honor?

THE COURT: Yes.

MR. DE PETRIS: The defendant admitted to the agents that he was dealing between 1 and 2 kilos a week, and I believe there is a reference to that in the Probation Report. This is not an amount which is needed to support any habit, this is an amount which the defendant is in for profit, and this information is consistent with the information gathered from other sources and informants that the Government has that this defendant was a major dealer in heroin.

I would also like to point out while he was out -- this is by his own admission -- that he was supporting himself while he was out on bail by continuing to deal in heroin, and that this helped finance a trip to Puerto Rico which he made while out on bail for several weeks.

As to his claim that he was about ready to turn himself in, in view of the fact that he had to be brought in and in view of the fact that one night when the agents were in a room where they expected he was he was hiding underneath a Castro convertible bed,

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stuffed underneath it, I would have to hold with 2 great skepticism any comments made by Mr. Smith. 3 THE COURT: Well, as Mr. Sturim pointed out, 4 he might have good intentions and still fail to carry 5 them out. 6 I do not regard addiction as a defense to some~ 7 thing like this. 8 Now, I don't know the whole story, I know there 9 are compulsions that are brought to bear and to some 10 extent an addict seller is less serious than a 11 non-addict seller, but it still is a serious matter. 12 THE DEFENDANT: Your Honor, I didn't make that 13 statement, your Honor, about being in the Castro or 14 made any sales while I was out on bail, I said I 15 bought drugs for my own personal use. 16 As to the Castro, I was not --17 THE COURT: You were not hiding? 18 THE DEFENDANT: No, I wasn't. 19 THE COURT: Well, you didn't come in. 20 This is what I am going to do: 21 I think that the Government has made a con-22 cession by accepting a plea to a 10-year count. They 23 told me they might still want to go to trial on the 24 25-year count if you did not cooperate, but I will 25 not impose a sentence on this count and put you to

matter. MR. DE PETRIS: That is the agreement at that 3 point. 5 THE COURT: On Indictment 72-CR-672, I impose 6 a sentence of 10 years imprisonment. On the information that was just filed, I will 7 impose a sentence of 2 years imprisonment consecutive, 8 but execution of the sentence is suspended, and there 9 will be two years probation after the conclusion of 10 the 10 years on the 672. There is no special parole 11 term on the 672 because this is not in fact another 12 13 narcotic conviction. And I will impose a fine of \$2,000 to be paid 14 under the supervision of the Probation Department on 15 the information, if he has any money after he comes out. 16 THE PROBATION OFFICER: May I approach the 17 18 bench just a moment? 19 THE COURT: Yes. Let me put this on the record with respect to 20 21 the fine: As I understand the law now a person is not 22 put in jail for failure to pay a fine. This is not 23 a stand committed fine. 24 I don't know whether the defendant may have 25

some money that other people are holding for him or whether he may come into some money later on. When 3 he is released, if he does not have any money, he will simply have to satisfy the Probation Department 5 with respect to that. 6 (The following occurred at side bar.) 7 THE PROBATION OFFICER: Will your Honor sign 8 a special condition of parole, in other words in all likelihood this defendant could be pardoned, at which 10 time he would be under the same Probation Department, 11 and in all likelihood if he were on parole he would 12 be working and earning a living at the time that he 13 would complete the 10-year sentence, the Probation 14 sentence would commence and we would assume by that 15 time he had comparative stability. 16 THE COURT: That might happen, too. 17 All right. 18 (The sentencing then continued in open Court.) 19 MR. DE PETRIS: At this time, your Honor, the 20 Government moves to dismiss --21 THE COURT: I think there are 5 counts in all. 22 MR. DE PETRIS: The defendant pleaded guilty to 23 Count 1. 24 At this time the Government moves to dismiss 25 Count 2, 3, 4 and 5 of Indictment No. 72-CR-672, as

THE COURT: The motion is granted. 3 MR. STURIM: Thank you very much. THE COURT: Good-afternoon. 5 MR. NIZIN: If your Honor pleases, may I 6 interject one thought: 7 There was one other matter that was pending 8 and which appears in the Probation Report, and that 9 was kept in the Southern District --10 THE COURT: What happened there? 11 MR. NIZIN: It is pending in this district, 12 and it was a matter that the defendant had been 13 arraigned in April of 1972 before the Commissioner 14 and was held at the option of the grand jury. There 15 has been no action taken. 16 I understood Mr. De Petris indicated to us that 17 they would not prosecute the defendant on that matter. 18 MR. DE PETRIS: The Government doesn't intend 19 to move further on that. 20 THE COURT: The 6 months have gone by and maybe 21 under the new rules you are supposed to make a motion 22 on 10 days notice, but I think, Mr. De Petris, you can 23 go to the magistrate and move to dismiss that. 24 MR. DE PETRIS: Yes, right. 25 THE COURT: Since sentence has been imposed here.

yaznat the detendant Charles Smith.

MR. STURIM: Thank you very much. MR. DE PETRIS: Thank you, your Honor. MR. STURIM: Your Honor, is it possible for the defendant's wife and son to visit with him briefly? THE COURT: He is the only defendant here imprisoned here, I think the marshal can probably permit it. Thank you. (This concluded the sentencing.) 

UNITED STATES OF AMERICA

- against -

CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON, and A. C. DOYLE,

Defendants.

THE GRAND JURY CHARGES:

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	-	-		Mineral Printers	-				

Cr. No. (T. 18, U.S.C., §111, §641, §2114, §2)

IN CLERK'S OFFICE
U. S. DISTRICT COURT ED. N.

# JUN 8 1972 5

TIME A.W.

#### COUNT ONE

On or about the 30th day of May, 1972, within the Eastern District of New York, the defendants CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON and A. C. DOYLE did rob John H. Talton, Jr., a person having lawful charge, control and custody of money of the United States, of approximately five thousand dollars (\$5,000) of said money which was then in the charge, control and custody of the said John H. Talton, Jr. (Title 18, United States Code, §2114 and§2)

# COUNT TWO

On or about the 30th day of May, 1972, within the Eastern District of New York, the defendants CHARLES SMETH, HERMAN ROBERTSON, RONALD JOHNSON and A. C. DOYLE did rob John H. Talton, Jr., a person having lawful charge, control and custody of money of the United States, of approximately five thousand dollars (\$5,060) of said money which was then in the charge, control and custody of the said John H. Talton, Jr., and the defendants CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON, and A. C. DOYLE, in effecting such robbery, did put the life of the said John H. Talton, Jr., in jeopardy by the use of dangerous weapons, to wit, two loaded hand guns.

(Title 18, United States Code, §§2114 and 2)

BEST COPY AVAILABLE

On or about the 30th day of May, 1972, within the Eastern District of New York, the defendants CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON and A. C. DOYLE wilfully did forcibly assault John H. Talton, Jr., a Special Agent of the Bureau of Narcotics and Dangerous Drugs, while the said agent was engaged in the performance of his official duties. (Title 18, United States Code, §111, §1114, and §2)

# COUNT FOUR

On or about the 30th day of May, 1972, within that Eastern District of New York, the defendants CHARLES SMITH, HERMAN ROBERTSON, RONALD JOHNSON and A. C. DOYLE wilfully and by means and use of dangerous weapons, that is, two hand guns, did forcibly assault John H. Talton, Jr., a Special Agent of the Eureau of Narcotics and Dangerous Drugs, whils the said agent was engaged in the performance of his official duties. (Title 15, United States Code, §111, §1114 and 32)

# COUNT FIVE

On or about the 30th day of May, 1972, within the Eastern District of New York, the defendants CHARLES SMITH, HERMAN ROBERTSON, ROMALD JOHNSON and A. C. DOYLE wilfully and knowingly did steal approximately five thousand dollars (\$5,000) of money of the United States. (Title 18, United States Code, £641and §2)

A TRUE BILL.

FOREMAN

UNITED STATES ACTORNEY
Eastern District of New York



# CERTIFICATE OF SERVICE

November 24, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

The Ay